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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Complainants,

v.

GTE NORTH, INC.,	File No. E-89-391
GTE SOUTH, INC.,	File No. E-89-392
GTE SOUTHWEST, INC.,	File No. E-89-393

Defendants.

ORDER

Adopted: October 8, 1992; Released: October 19, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. Cable and Wireless Communications, Inc., ITT Communications Services, Inc., Litel Telecommunications Corporation, Metromedia Long Distance, Inc., NTS Communications, Inc., Schneider Communications, Inc., and Westel, Inc., ("Joint Complainants") filed the above-captioned formal complaints against GTE North, Inc., GTE South, Inc., and GTE Southwest, Inc. (collectively "GTE") seeking damages resulting from GTE's alleged violations of the Commission's rate of return prescription for the period October 1, 1985 through December 31, 1986. On September 25, 1992, however, the Joint Complainants filed a motion requesting that the complaints be dismissed stating that they have either settled with GTE or did not take service from GTE.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Complainants' Motion for Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Afton Communications Corporation — File No. 63500-92-4-JSG

Notice of Apparent Liability for Forfeiture Penalty for Station KNKC693 in the Public Land Mobile Service at Tazewell, Virginia.

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 1992; Released: October 19, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Afton Communications Corporation (Afton) has filed a request for reconsideration of the $6,000 forfeiture proposed by the Mobile Services Division (MSD) in a "Notice of Apparent Liability for Forfeiture" (*NALF*) released on January 21, 1992. *See Afton Communications Corporation*, 7 FCC Rcd 514 (Mob. Serv. Div. 1992). For the reasons stated below, we deny Afton's request.

II. BACKGROUND

2. On September 18, 1990, the Commission granted an authorization to Afton to operate on frequency 158.10 MHz at Tazewell, Virginia. The expiration date of the authorization was September 18, 1991. On September 12, 1991, Afton completed construction of the facilities and commenced operations. On October 4, 1991, Afton filed FCC Form 489, Notification of Status of Facilities, to request reinstatement. Because Afton completed construction within the required one-year period of construction, its authorization was not found to have expired.

3. The *NALF* pointed out that an apparent violation of Section 22.9(b)(1)[1] had occurred because Afton had commenced operation without timely filing FCC Form 489 with the Commission and that Afton's failure to file the required Form 489 until October 4, 1991, constituted willful and repeated conduct within the terms of Section 503(b) of the Communications Act (the Act). The *NALF* went on to say that pursuant to the *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, 7 FCC Rcd 5339 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), the base forfeiture amount for failing to file required forms is $30,000, but that the forfeiture was being adjusted downward by $15,000 because failing to file an FCC Form 489 is a relatively minor violation, and by an additional $9,000 because Afton voluntarily disclosed its failure to file the FCC Form 489. Consequently, the *NALF* established a $6,000 forfeiture.

III. AFTON REQUEST

4. Afton initially states that it provides radio common carrier service to the Appalachian Region of Southwestern Virginia, assertedly one of the poorest in the country, and its customers are emergency services of various localities and the Commonwealth of Virginia as well as hospitals and medical operations. Afton claims its start-up costs were approximately $35,000, that only in 1991 did its "owners/operators" receive any compensation, which amounted to $12,000, and only on February 1, 1992, was Afton able to hire a full-time secretary/bookkeeper. Afton asserts that its after-tax profit for 1991 was $49,147.72, with the bulk going into new equipment, and has submitted its unaudited balance sheet as of December 31, 1991, "to verify" its net-profit figure. It contends that the $6,000 forfeiture is 12 percent of its profit and that the Commission would not levy a fine equal to 12 percent of after-tax profit on large companies such as American Telephone and Telegraph Co. (AT&T) for a relatively minor violation such as Afton's. It claims that companies such as AT&T have the resources to deal with "the maze of rules, regulations and oppressive paperwork that governments at all levels strangle small businesses with [but small businesses such as Afton] can simply not function under the oppressive burden that governments at all levels continue to saddle us with no matter how well intended their goals may be." Afton Request at 2.

5. Afton "take[s] the use of the language [of Section 503(b) of the Act and the *NALF* that willful and repeated conduct on the part of Afton was present] as a personal affront and suggest[s] an apology may be in order." *Id.* Afton states that there was an error on its part and when it was discovered 12 days after its construction permit expired and 18 days after it began operation of the station, it immediately sought help from its engineer to correct the oversight. Afton states that its engineer contacted the MSD, which purportedly gave the impression that if necessary forms and fees were filed, that would suffice. Afton further states that the MSD contacted Afton's engineer on December 9, 1991, requesting a letter of explanation for the late filing of the FCC Form 489, and that Afton submitted the information on October 4, 1991.[2]

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[1] Section 22.9(b)(1) provides that:

> *Notification of status of facilities.* (FCC Form 489). When construction has been completed in accordance with the radio station authorization, the licensee shall so notify the Commission using Form 489. Licensees can commence service the day Form 489 is placed in the mail to the FCC.

[2] The *NALF* was released on January 21, 1992, and stated that payment of the forfeiture could be made within thirty days (*i.e.*, by February 20, 1992). Although a copy of the *NALF* was not immediately sent to Afton, one was subsequently sent by certified mail, and Afton acknowledged receipt on March 13, 1992.

IV. DISCUSSION

6. In 1989, Congress amended the Communications Act to increase substantially the maximum amounts of forfeitures that may be imposed under Section 503(b) and other sections of the Act.[3] The increases in the Commission's forfeiture authority placed licensees on notice that violators of the Act or Commission rules could be subject to substantial forfeitures. The *Policy Statement* merely implements the statutory Section 503(b) increases, and the *NALF* follows the guidelines in the *Policy Statement* in proposing the forfeiture.

7. We reject Afton's arguments regarding its inability to pay the forfeiture. Additional updated financial information was requested from Afton[4] and based upon our review of the requested information, we find Afton's financial arguments meritless. Afton's unaudited total operating revenues for the period ending December 31, 1990, were $153,457, and its projected operating revenues for the period ending December 31, 1992, are $217,960 (from cash received from customers).[5] Our determination of a licensee's ability to pay a forfeiture should reflect whether the licensee in general is financially capable of paying the forfeiture. Here the $6,000 forfeiture is approximately 3.91 percent of Afton's 1990 revenues and approximately 2.75 percent of Afton's projected 1992 revenue. The Commission previously has stated that, in general, a licensee's gross revenues are the best indicator of its ability to pay a forfeiture and that use of gross revenues in determining a party's ability to pay is reasonable, appropriate, and a useful yardstick in helping to analyze a company's financial condition for forfeiture purposes. *PJB Communications of Virginia*, 7 FCC Rcd 2088-89 (1992).

8. We find irrelevant Afton's comparison of large and small businesses as justifying Afton's failure or inability to comply with the Commission's Rules. Afton's claim that it does not have the resources to comply with the Commission's Rules is no defense to a rule violation. The Commission's Rules make no distinction as to the size of a licensee (whether financial or otherwise) in requiring compliance with its regulations. *See* Section 0.406 of the Commission's Rules, 47 C.F.R. Sec. 0.406.

9. We reject Afton's suggestion that its violation does not constitute willful and repeated conduct. Section 312(f) of the Act, which also applies to Section 503(b) of the Act,[6] provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Therefore, the fact that a licensee's violation occurred through inadvertence does not prevent it from being willful; all that is necessary is that the licensee know that it was doing the act in question. *See Southern California Broadcasting Co., supra.* There is no dispute that a violation of Section 22.9(b)(1) has occurred. Regarding "repeated conduct," Section 312(f)(2) of the Act provides:

> the term "repeated", when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

This definition applies to Section 503(b) as well.[7] There is no dispute that Afton's action, *i.e.*, failing to timely file FCC Form 489, continued for more than one day within the one year prior to issuance of the *NALF*. By its very terms, Section 312(f)(2) deems such an action to be "repeated."

V. CONCLUSION

10. Based upon our review, we conclude that Afton has not justified remission or reduction of the $6,000 forfeiture.

VI. ORDERING PARAGRAPHS

11. Accordingly, IT IS ORDERED that the request for reconsideration in the above-captioned proceeding, filed by Afton Communications Corporation, IS DENIED.

12. IT IS FURTHER ORDERED pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Sec. 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. Sec. 1.80, that Afton Communications Corporation SHALL FORFEIT to the United States the sum of six thousand dollars ($6,000) for violation of Section 22.29(b)(1) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument, noting the above-captioned file number on its payment, to the Commission within thirty (30) days of the release date of this Order, payable to the order of the Federal Communications Commission, at: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

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[3] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (signed into law Dec. 19, 1989). The Commission amended Section 1.80 of its Rules to reflect the Section 503(b) increases. *Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990).

[4] *See* Letter from G. Vogt to E. Clark, Jr. (May 15, 1992). In that letter, the Mobile Services Division (MSD) pointed out to Afton that the balance sheet it submitted listed only Afton's liabilities and stockholders' equity as of December 31, 1991, and additional updated financial information had to be submitted in order to make a determination concerning Afton's asserted inability to pay the forfeiture. Specifically, Afton was requested to provide a complete balance sheet and profit-and-loss statement for the previous 12 months (*i.e.*, from the period from May 1991 through April 1992) and Afton's projected revenue and cash-flow projections for the next 12 months (*i.e.*, from June 1992 through May 1993).

[5] Afton's revenue figures supplied in response to the MSD's letter did not correspond exactly to the requested time frames. Nevertheless, we accept Afton's proffered figures because the different time periods *vis-a-vis* the revenue figures do not appear to be of decisional significance in determining Afton's ability or inability to pay the $6,000 forfeiture.

[6] *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

[7] *See* H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 50-51 (1982).

13. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. Sec. 504(a).

14. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Afton Communications Corporation by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-189

In the Matter of

Georgia Public Safety Plan

ORDER

Adopted: October 9, 1992; Released: October 19, 1992

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On April 7, 1992 Region 10 (Georgia) submitted its Public Safety Plan to the Commission for review. The Plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in Georgia.

2. The Georgia Plan was placed on Public Notice for comments on August 11, 1992, 57 FR 37165 (August 18, 1992). The Commission received no comments in this proceeding.

3. We have reviewed the Plan submitted for Georgia and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Georgia.

4. Therefore, we accept the Georgia Public Safety Radio Plan. Furthermore, licensing of the 821-824/866-869 MHz band in Georgia may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-92-194

Application for authority to acquire and operate facilities for direct service between the U.S. and Belize and Tanzania.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 7, 1992; Released: October 20, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Belize and Tanzania[1] by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-194 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 22 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate Intelsat satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Belize furnished by MCI's correspondent in Belize;

b. own and operate 22 voice-grade circuits in the Andover earth station to be used in conjuction with the space segment capacity;

c. own and operate 22 voice-grade connecting circuits between the Andover earth station and MCI's West Orange, New Jersey operating center;

d. use the facilities in a, b and c above to provide MCI's regularly authorized services between the U.S. and Belize;

e. lease from Comsat and operate 10 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate Intelsat satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Tanzania furnished by MCI's correspondent in Tanzania;

f. lease from AT&T and operate 10 voice-grade circuits in the Etam earth station to be used in conjunction with the satellite space segment capacity;

g. lease and operate 10 voice-grade connecting circuits between the Etam earth station and MCI's West Orange, New Jersey operating center; and

h. use the facilities in e, f and g above to provide MCI's regularly authorized services between the U.S. and Tanzania.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCI and its correspondents in Belize and Tanzania, and a copy of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines is limited to the provision of such private lines only between the United States and Belize and Tanzania -- that is, private lines which originate in the United States and terminate in Belize and Tanzania or which originate in Belize and Tanzania and terminate in the United States. In addition, MCI may not --and MCI's tariff must state that MCI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Belize and Tanzania end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Belize and Tanzania afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

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[1] In its application MCI requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Belize and Tanzania and points beyond. We note that should MCI obtain any interest in facilities beyond Belize and Tanzania for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL INC. File No. I-T-C-92-196

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the PTAT-1 Cable System for the provision of authorized common carrier service between the United States and Montserrat.

ORDER AND AUTHORIZATION

Adopted: October 7, 1992; Released: October 20, 1992

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 18, 1992 and supplemented by letter of August 21, 1992 by MCI International, Inc. (MCII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and Montserrat.[1] The application was placed on public notice on June 24, 1992. No comments were received.

2. MCII is a non-dominant international carrier currently providing international services to the points reached via the PTAT-1 cable system. MCII has been authorized to acquire and operate capacities in the PTAT-1 cable system for service between the U.S. and the United Kingdom, the Republic of Ireland, Bermuda, Antigua, Dominica, and St. Kitts and Nevis.[2] It now proposes to acquire and operate an additional one-half interest in eight (8) voice-grade circuits in PTAT-1. MCII states that it will be using the capacity in PTAT-1 to supplement existing facilities and not to divert any portion of its traffic from other existing common carrier facilities.

3. The Commission stated in its Private Submarine Cable Decision[3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] In this context, we find that MCII's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[5] Furthermore, we find that MCII's application does not raise any economic impact issues.[6]

4. Upon consideration of the application, we find that authorization of the facilities requested would serve the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-196 IS GRANTED and MCII is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one half interest in and operate eight (8) voice-grade circuits in the PTAT-1 cable between the cablehead at Manasquan, New Jersey and the cablehead at Devonshire, Bermuda;

b. lease and operate 8 voice-grade connecting circuits between the cablehead at Manasquan, New Jersey and MCII's West Orange, New Jersey operating center;

c. acquire, on an IRU basis, a one-half interest in and operate 8 voice-grade circuits in the Caribbean Atlantic Cable System (CARAC) between Devonshire, Bermuda and Chawell, Tortola;

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[1] In its application MCII requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Montserrat and points beyond. We note that should MCII obtain any interest in facilities beyond Montserrat for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MCII to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] *See* CICI, Inc. *et al*, 4 FCC Rcd 6622 (1989) and MCI International, Inc., 4 FCC Rcd 8446 (1989), 5 FCC Rcd 453 (1990), 5 FCC Rcd 1929 (1990), 5 FCC Rcd 7710 (1990), and 7 FCC Rcd 5009 (1992).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International* decision in which the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. International Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] The Commission places no special burdens on any carrier filing an application to use private cable capacity. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989)(Pacific Telecom decision).

[6] In its Pacific Telecom decision, the Commission stated that it has authority under its public interest mandate under Section 214 to consider sua sponte any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

d. lease a one-half interest in and operate 8 voice-grade connecting circuits between the CARAC cablehead at Chawell, Tortola and the Digital Eastern Caribbean Microwave System (DECMS);

e. lease a one-half interest in and operate 8 voice-grade circuits in the DECMS between Tortola and Montserrat; and

f. use said facilities to provide MCII's regularly authorized services between the U.S. and Montserrat.

6. IT IS FURTHER ORDERED that our authorization of MCII to provide private lines is limited to the provision of such private lines only between the United States and Montserrat -- that is, private lines which originate in the United States and terminate in Montserrat or which originate in Montserrat and terminate in the United States. In addition, MCII may not -- and MCII's tariff must state that MCII's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Montserrat end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Montserrat affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

7. IT IS FURTHER ORDERED that neither MCII nor any persons or companies directly or indirectly controlling or controlled by MCII, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCII or any persons or companies controlling or controlled by MCII are parties.

8. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between MCII and its correspondent, and a copy of the agreements shall be filed with the Commission within 30 days of its execution.

9. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

10. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions of any license issued to PSI herein under the act entitiled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

AmeriCall Systems of Louisville, Assignor, — File No. I-T-C-92-197-AL

and

AmeriCall Systems, Inc., a subsidiary of Advanced Telecommunications Corp., Assignee

First Phone of New England, Inc., a Massachusetts Corporation, Assignor — File No. I-T-C-92-198-AL

and

First Phone of New England, Inc., a Delaware Corporation and subsidiary of Advanced Telecommunications Corporation, Assignee

Advanced Telecommunications Corporation, Assignor, — File No. I-T-C-92-203-TC

and

LDDS Communications, Inc., Assignee

For authority pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international resale authorizations

MEMORANDUM, OPINION AND ORDER

Adopted: October 6, 1992; Released: October 20, 1992

By the Chief, International Facilities Division:

1. The first above-captioned application was filed by AmeriCall Systems of Louisville (ASL), assignor, and AmeriCall Systems, Inc. (ASI), a subsidiary of Advanced Telecommunications Corp. (ATC), assignee, on June 22, 1992. The second above-captioned application was filed by First Phone of New England, Inc., a Massachusetts corporation (FPNE/Mass), assignor, and First Phone Of New England, Inc., a Delaware corporation and subsidiary of ATC (FPNE/ATC), assignee, also on June 22, 1992. The third above-captioned application was filed by ATC, assignor, and LDDS Communications, Inc. (LDDS), assignee, on June 26, 1992. They were filed pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules requesting authority to transfer control of Section 214 authorizations from the assignors to the assignees. The application in File No. I-T-C-92-203 also requests the cancellation of three unused Section 214 authorizations.[1]

2. The first two applications were put on public notice on July 1, 1992, and the last on July 8, 1992. No comments were received. On July 15, 1992, amendments were filed to the applications in File Nos. I-T-C-92-197-AL and I-T-C-92-198-AL advising the Commission of the impending change in the ownership of ATC, as explained in File No. I-T-C-92-203-TC.[2] These amendments were placed on public notice on July 22, 1992. Again, no comments were received.

3. ASL is a Kentucky joint venture that has authority to provide international switched voice services by the resale of the international switched voice services set forth in AT&T Tariff FCC Nos. 1 and 2, MCI Tariff FCC No. 1, and US Sprint Tariff FCC Nos. 1 and 2 between the U.S. and points listed in those tariffs.[3] It also provides domestic interexchange telephone service through the resale of other carriers' services. ASI is a Georgia Corporation that also offers domestic interexchange telephone service through the resale of other carriers' facilities. The application states that ASI is operated separately from ATC. ASI claims to be a non-dominant international carrier operating under the regulatory requirements established in *International Competitive Carrier Policies*.[4]

4. FPNE/Mass is a Massachusetts corporation that has authority to provide international switched voice services by the resale of the international switched voice services set forth in AT&T Tariff FCC Nos. 1 and 2, MCI Tariff FCC No. 1, and US Sprint Tariff FCC Nos. 1 and 2 between the U.S. and points listed in those tariffs.[5] It also provides

[1] Telus Communications, Inc., File No. I-T-C-89-166-TC-(2), letter from George S. Li, Chief, International Facilities Division, to Barry Lambergman, Counsel for Telus Communications, Inc., dated November 13, 1989; South Tel, Inc., File No. I-T-C-91-092, 6 FCC Rcd 2956 (1991); Claydesta Communications, Inc., File No. I-T-C-89-035-TC, letter from George S. Li, Chief, International Facilities Division, to Thomas H. Coleman, Jr., Counsel for Claydesta Communications, Inc., dated February 3, 1989.

[2] See File Nos. I-T-C-92-197-A and I-T-C-92-198-A.

[3] AmeriCall Systems of Louisville, File No. I-T-C-90-177, 6 FCC Rcd 241 (1991).

[4] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies*).

[5] First Phone of New England, Inc., File No. I-T-C-89-105, 4 FCC Rcd 5474 (1989).

domestic interexchange telephone service through the resale of other carriers' services. FPNE/ATC is a Delaware corporation and a subsidiary of ATC. The application states that FPNE/ATC is operated separately from ATC. FPNE/ATC claims to be a non-dominant international carrier operating under the regulatory requirements established in *International Competitive Carrier Policies*.

5. ATC is a Delaware corporation whose principal business, along with its various subsidiaries, is the provision of interexchange services through a combination of its own fiber optic and microwave facilities and the resale of other carriers' services in several states. ATC and several of its subsidiaries have authority to provide resold international message telephone service (IMTS)[6] and domestic interexchange services pursuant to the Commission's domestic competitive carrier policies[7] and under the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*. Furthermore, it provides intrastate service in 36 states, either pursuant to certification, registration or tariff requirements, or on an unregulated basis.

6. LDDS is a Tennessee corporation that, through its existing subsidiaries, provides interexchange telephone service to various locations throughout the United States as a non-dominant carrier pursuant to the Commission's domestic competitive carrier policies, and resells international switched voice services and provides direct service to Iran pursuant to the regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[8] Furthermore, its subsidiaries provide intrastate service in 27 states, either pursuant to certification, registration or tariff requirements, or on an unregulated basis.

7. ATC, ASI, and ASL state that on November 25, 1991, they executed a purchase agreement pursuant to which ASI acquired all of the joint venture interest in ASL as well as all of ASL's assets. They say that the transaction did not affect the day-to-day operation of ASL's long distance business and was transparent to ASL's existing customers. ASI will continue to operate as a separate entity from ATC with its own personnel and books of account and will continue to provide IMTS resale service pursuant to the same terms and conditions previously set forth in ASL's tariff. The parties argue that their transaction will serve the public interest by increasing the financial strength of ASI and creating certain network efficiencies. This should enable ASI to become an effective competitor in the IMTS market, lower costs, and reduce upward pressure on international rates. ASI will also benefit from ATC's expertise.

8. FPNE/Mass and ATC similarly state that on November 25, 1991, they executed an agreement pursuant to which FPNE/Mass was ultimately merged into FPNE/ATC. FPNE/Mass's stock was converted into cash and shares of ATC stock, and certain of FPNE/Mass's indebtedness was retired. They say that the transaction was transparent to FPNE/Mass's existing customers because billing, customer service, network maintenance and other day-to-day operations remain unchanged. FPNE/ATC will continue to operate as a separate entity from ATC with its own personnel and books of account and will continue to provide IMTS resale service pursuant to the same terms and conditions previously set forth in FPNE/Mass's tariff. The parties argue that their transaction will serve the public interest by increasing the financial strength of FPNE/ATC and creating certain network efficiencies. This should enable FPNE/ATC to become an effective competitor in the IMTS market, lower costs, and reduce upward pressure on international rates. FPNE/ATC will also benefit from ATC's expertise.

9. ATC and LDDS have negotiated an agreement whereby LDDS will gain control of ATC by acquiring all the outstanding shares of common stock of ATC in exchange for shares of LDDS stock. ATC will become a wholly owned subsidiary of LDDS. Neither ATC's name nor the terms and conditions of its services will be affected. ATC and its subsidiaries will continue to provide services pursuant to their tariffs. The transaction will be transparent to ATC's customers and will not cause inconvenience or confusion. They state that grant of their application will permit them to realize significant economic and operational efficiencies, promoting competitive pricing and increased availability of service options.

10. In view of the foregoing, we conclude that the transfer of control of ASL's Section 214 authorization to ASI, FPNE/Mass's Section 214 authorization to FPNE/ATC, and ATC's Section 214 authorizations to LDDS will not adversely affect the public interest. These authorizations are without prejudice to any further action the Commission might take with respect to ASI's acquisition of ASL and FPNE/ATC's acquisition of FPNE/Mass without appropriate authorization. We also conclude that the cancellation of the unused Section 214 authorizations of South Tel, Inc., Telus Communications, Inc., and Claydesta Communications, Inc. will not adversely affect the public interest (*see* n.1).

11. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application, as amended, of

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[6] Advanced Telecommunications Corporation, File No. I-T-C-86-099, Mimeo 6047, released July 30, 1986; Directline of Austin, Inc., File No. I-T-C-88-136, Transcall America, Inc., File No. I-T-C-88-135, and Satelco Inc., File No. I-T-C-88-134, 3 FCC Rcd 4348 (1988); Microtel, Inc., File No. I-T-C-86-075, Mimeo No. 4445, released May 13, 1986, transferred, File No. I-T-C-88-123-TC, 3 FCC Rcd 4383 (1988).

[7] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980); Second Report and Order, 91 FCC 2d 59 (1982); *recon.*, 93 FCC 2d 54 (1983).

[8] *See*, MidAmerican Communications Corporation, File No. I-T-C-91-102-TC, 6 FCC Rcd 4176 (1991); Telamarketing Corporation of Louisiana, File No. I-T-C-90-114-TC, 5 FCC Rcd 7263 (1990); Advantage Companies, Inc., File No. I-T-C-90-008-TC, 5 FCC Rcd 694 (1990); Tele-Fibernet Corporation, File No. 92-177-TC, 7 FCC Rcd 5172 (1992); Prime Long Distance Services, Inc. d/b/a Long Distance for Less, File No. I-T-C-92-040, 7 FCC Rcd 2003 (1992); National Teleservices Company, Inc., File No. I-T-C-91-101, and TRI-J Enterprises, Inc., File No. I-T-C-91-098, 6 FCC Rcd 3605 (1991); American Pioneer Telephone of Texas, Inc., LDDS of Alabama, Inc., LDDS of Arkansas, Inc., LDDS of Indiana, Inc., LDDS of Kansas City, Inc., LDDS of Kentucky, Inc., LDDS-II, Inc., Com-Link 21 Inc., LDDS of Tennessee, Inc., File Nos. I-T-C-90-056-064, 5 FCC Rcd 3230 (1990).

AmeriCall Systems of Louisville and AmeriCall Systems, Inc., File No. I-T-C-92-197-AL, IS GRANTED and we consent to the transfer of control of ASL and its Section 214 authorization (*see* n.3) to ASI and concomitantly to LDDS.

12. IT IS FURTHER ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application, as amended, of First Phone of New England, Inc., a Massachusetts corporation, and First Phone Of New England, Inc., a Delaware corporation and subsidiary of Advanced Telecommunications Corporation, File No. I-T-C-92-198-AL, IS GRANTED and we consent to the transfer of control of FPNE/Mass and its Section 214 authorization (*see* n.5) to FPNE/ATC and concomitantly to LDDS.

13. IT IS FURTHER ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Advanced Telecommunications Corporation and LDDS Communications, Inc., File No. I-T-C-92-203-TC, IS GRANTED and we consent to the transfer of control of ATC and its Section 214 authorizations (*see* n.6) to LDDS.

14. IT IS FURTHER ORDERED that the request for cancellation made by Advanced Telecommunications Corporation IS GRANTED and we cancel, without prejudice, the unused Section 214 authorizations of South Tel, Inc., Telus Communications, Inc., and Claydesta Communications, Inc. (*see* n.1).

15. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that ASI, FPNE/ATC, and ATC must continue to maintain tariffs for the services authorized in this order.

16. IT IS FURTHER ORDERED that ASI, FPNE/ATC, and ATC must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

17. IT IS FURTHER ORDERED that ASI, FPNE/ATC, and ATC are limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in the tariffs specified in the authorizations being transferred between the U.S. and the points listed in those tariffs in accordance with the previous authorizations (*see* n.3, 5, 6).

18. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

19. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

CITY OF STERLING, COLORADO	CSR-3294 CO0027
Application for Review	
Petition for Special Relief	CSR-3404

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 1992; Released: October 20, 1992

By the Commission:

1. On April 8, 1991, TCI Cablevision of Colorado, Inc. [TCI], operator of a cable television system serving Sterling, Colorado, filed an application for review of the decision of the Chief, Mass Media Bureau, in *City of Sterling, Colorado*, Cable Television Actions Report No. 3325, (released March 6, 1991) [*Sterling II*]. TCI's application is opposed by the City of Sterling, Colorado [the City], and TCI has replied.[1]

2. Following adoption of the Cable Act, the Commission promulgated rules to implement provisions of the Cable Act. Among the rules adopted was §76.33, establishing standards for regulating cable television service rates. That rule states, in pertinent part:

> Only cable systems that are not subject to effective competition may be rate regulated. A cable system will be determined to be subject to effective competition whenever 100 percent of the cable community receives services from at least three unduplicated broadcast television signals. It is not necessary that the same three signals provide service to the entire community. Signals shall be counted on the basis of their predicted Grade B contour (as defined in §73.683 of the rules) or whether they are significantly viewed within the cable community, as defined in §76.54(b) and (c) of the rules. A signal that is significantly viewed shall be considered to be available to 100 percent of the cable community. A translator station authorized to serve the cable community is to be counted in the same manner as a full-service station, except that its coverage area shall be based on its protected contour as specified in §74.707 of the rules, provided that the translator is not used to retransmit a station already providing a Grade B contour or significantly viewed signal within the cable community.

47 C.F.R. §76.33(a)(2). Parties may challenge the availability of a signal, for purposes of this rule, through the Commission's special relief process. 47 C.F.R. §76.33(c). The rule applies to all cable systems as of October 29, 1988.[2]

3. Television station contour maps on file with the Commission show that only one television broadcast station -- Station KTVS (CBS, Channel 3), Sterling, Colorado -- places a predicted Grade B contour over all of Sterling. Four translator stations -- Television Translator Stations K23AB, K25AF, K27AG, and K29AC -- are all authorized to serve the Sterling, Colorado area, but their protected contours, as specified in §74.707 of the Commission's Rules, fail to encompass Sterling, either singularly or in concert. On May 1, 1989, TCI increased its rates for basic cable service from $15.25 per month to $17.00 per month, and thereafter, on June 15, 1989, petitioned the Commission for a ruling that TCI *is* subject to effective competition in Sterling. The City filed a countervailing petition the following day. Both TCI and The City withdrew their petitions in August 1989. *See TCI Cablevision of Colorado, Inc.*, Cable Television Actions Report No. 3239, Mimeo No. 4406 (released September 12, 1989). However, in October 1989, the City filed a petition for a declaratory ruling that TCI was not subject to effective competition. The Chief, Mass Media Bureau, granted this petition, noting that:

> the *prima facie* evidence in this case shows that Sterling is served by only one broadcast television signal, which is insufficient to support a finding of effective competition.

City of Sterling, Colorado, 5 FCC 2d Rcd 1991, 1992 (1990) [*Sterling I*]. TCI had not sought a Commission determination contradicting the *prima facie* evidence, but instead chose to rely on its own field strength measurements and analysis, which were subsequently presented by the City to the Commission. TCI's signal strength study was found to be defective because it failed to comport with §73.686 of our rules. Section 73.686 sets out the methodology to be followed for engineering studies used to demonstrate the availability of television signals over a community. TCI's study failed to incorporate community or topographic maps. It also did not include computation of mean and standard deviations of the relevant field strengths measured. These two key omissions precluded an accurate appraisal of the study by the Commission's staff. Accordingly, TCI's measurements were found to have failed to demonstrate the presence of three signals in the community, either pursuant to §§73.686 and 76.33 of the Commission's Rules or by any other showing.

4. TCI sought reconsideration of this decision, which was denied. *Sterling II, supra*. The Bureau found that TCI's evidence simply failed to be probative of its position. Its engineering study was not conducted pursuant to the requirements of §76.33(a)(2) of the Rules, and was found unpersuasive. The Bureau further held that a flawed study

[1] Additionally, TCI has filed a second petition for special relief which contains a more recent engineering study which we shall address in the context of this proceeding. *See* paragraph 6, *infra*. The City has also opposed this petition, and TCI has responded.

[2] The rule, effective since October 29, 1988, has been further amended, effective October 25, 1991, to specify a six-signal or alternative multichannel video provider standard. *Report and Order and Second Further Notice of Proposed Rulemaking in MM Docket Nos. 90-4 and 84-1296*, 6 FCC Rcd 4545 (1991).

of any sort could not be accepted as a sufficient "other showing" pursuant to §76.33(a)(3) of the Rules. *Sterling II, supra.* TCI now seeks Commission review of this decision.

5. We affirm the staff's ruling. It is clear that the *prima facie* evidence presented by the contour maps of the relevant stations did not indicate the presence of effective competition. It is also clear, that TCI's data cannot be accepted as a valid engineering study because it has not been collected in the manner specified in the rules. Further, we agree with the staff that a flawed engineering study cannot be made acceptable simply by calling it an alternative showing.

6. At the time it filed a petition for reconsideration of *Sterling I,* TCI also filed a separate but related petition seeking waiver of the Commission's effective competition standard, based upon a more recent engineering showing submitted pursuant to §76.33(a)(3) of the Commission's Rules (CSR-3404). TCI contends that the Bureau should have taken this new engineering showing into consideration when deciding whether to reconsider its decision in *Sterling I.* We disagree. The central issue in dispute here is the validity of the evidence initially presented in this proceeding. The submission of new engineering data in the context of a second, separate proceeding is simply not relevant to the correctness of the Bureau's initial analysis and determination made in *Sterling I* on the basis of the evidence then before it.[3] Nevertheless, in order to bring this matter to closure, we have reviewed TCI's submissions in CSR-3404.

7. At issue is the question of whether translator stations K23AB, K25AF, K27AG, and K29AC provide service to Sterling sufficient to establish the presence of effective competition. For purposes of establishing the presence of effective competition, the rules provided that translator stations are to be counted in the same manner as full-service stations, except that the coverage area of a translator is its "protected contour" rather than the Grade B contour used for full-service stations. It is undisputed that the protected contours of the translator stations in question do not cover Sterling. The rules also provide that the Commission may grant waivers of this standard based on engineering studies undertaken by parties seeking to dispute the absence or presence of effective competition that appears to exist on a predicted signal basis. TCI has requested such a waiver and has submitted an engineering study. The City, in opposition, maintains that TCI's test results are invalid and do not demonstrate the presence of effective competition.

8. TCI's study, undertaken in compliance with the procedural requirements of the rules, employs sixteen test points distributed over Sterling on a rectangular grid. Measurements for each translator station were taken at each of these points and the results show that eight out of sixteen of these test points receive 74 dBu service, thus apparently meeting the threshold fifty percent signal availability requirements to establish a signal's availability.[4]

9. The City maintains however, that terrain and population factors render this conclusion invalid. Sterling is divided by a Union Pacific railroad line. The City asserts that between ninety and ninety-five percent of its 4700 residents live west of the railroad line. Further it maintains that out of the eight of sixteen points which show 74 dBu service, only two are located in the populated western portion of the community, and these two are on the fringe of the community. The remaining points that show 74 dBu service are all located in the underpopulated eastern portion of the community. Further, three of these essential points are located on a flood plain where future residential construction is prohibited by zoning ordinance.[5] Thus, the City maintains, TCI's test results are unpersuasive, and granting a waiver in these circumstances specifying the presence of effective competition in Sterling would not promote the underlying purpose of the rules.

10. The rules are specific that parties seeking to proceed outside of the predicted contour provisions of the rules are in the position of wavier applicants.[6] The burden is thus on the applicant to provide a persuasive demonstration that, notwithstanding the absence of predicted service, competitive over-the air service is actually available. Given the confluence of unique factors presented here, we conclude that TCI has not carried that burden. Notwithstanding its engineering submission, it is evident that service at the required signal strength level specified in the rules is largely unavailable to television viewers in Sterling and thus effective competition -- even under the former three signal standard -- is lacking. TCI's study demonstrates that the signals in question just barely meet the required service level at eight test points and do not meet the required level at the other eight points. Its study and the City's response further reveal that in the western portion of Sterling, where over ninety percent of the population resides, only two out of eight test points receive 74 dBu service and these two points are located on the fringe of the community. Of the 4700 residents of Sterling, only 45 households are located in the eastern portion. Six of the test points that receive 74 dBu service are located in the unpopulated eastern portion of the community and at least three of these lie on a flood plain where future residential construction is prohibited by zoning ordinances that are unlikely to change in the future. Taking into consideration the unique circumstances revealed here by TCI's study and Sterling's response and taking into account the orientation of Sterling in relation to the signals in question, the marginal showing with respect to the entire community, and the prevalence of 74 dBu measurements in the underpopulated portion of the community, and in the unpopulated flood plain, we conclude that TCI has not carried its waiver burden.

11. In view of the foregoing, we find that grant of TCI's application for review (CSR-3294) and its petition for special relief (CSR-3404) is not in the public interest.

12. Accordingly, IT IS ORDERED, That the application for review and petition for special relief filed by TCI Cablevision of Colorado, Inc., ARE DENIED.

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[3] *Cf. Colorado Radio Corp. v. FCC,* 118 F. 2d 24, 26 (D.C. Cir. 1941). ("We cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence.")

[4] For channels 14 through 69, §74.707 identifies the protected contour as the 74 dBu contour.

[5] *See* Declaration of Joseph D. Kiolbosa, Director of Public Works for the City of Sterling.

[6] §76.33(a)(3): "The Commission may grant waivers of the effective competition standard where the filing party submits one or more of the following showings. . . ."

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

REGION 17 EDUCATION SERVICE CENTER
Lubbock, TX — File No. BPLIF-901024DP

FRENSHIP INDEPENDENT SCHOOL DISTRICT
Lubbock, TX — File No. BPLIF-910114DA

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1992; Released: October 20, 1992

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Region 17 Education Service Center (Region 17) and Frenship Independent School District (Frenship), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in the Lubbock, Texas area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of Region 17 and Frenship. Region 17 is qualified to be an ITFS licensee. It is a governmental organization engaged in the formal education of enrolled students, and it is accredited by the Texas Education Agency.[1] Although Region 17 proposes to serve students outside its district, because it also proposes to serve schools within its own district, it qualifies as a local applicant.

3. Frenship, a governmental organization engaged in the formal education of enrolled students and accredited by the Texas Education Agency, is also a qualified ITFS applicant. Frenship proposes to serve schools within its own region, and is therefore a local applicant, even though it, too, proposes to serve students outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

4. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d at 65-72; 47 C.F.R. §74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

5. Under this comparative selection process, Region 17 and Frenship are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being a governmental entity serving the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant, accredited by the Texas Education Agency, is entitled to three points for accreditation.[4]

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[1] The 20 regional educational service centers are public institutions created and authorized by the Texas Legislature and are directly accountable to the Commissioner of Education and the State Board of Education. These centers provide a variety of services to school districts, including direct student instruction and the development and enhancement of curriculum materials. Accordingly, although participation by schools within the region is voluntary, we find that the regional educational service centers are indeed governmental organizations engaged in the formal education of students enrolled in schools within their areas.

[2] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[3] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[4] Frenship contends that Region 17 is not entitled to accreditation points because it is neither an accredited educational entity nor a governing body of such an accredited entity. Moreover, according to Frenship, Region 17 does not have enrolled students. We disagree. First, Frenship's arguments go to the basic eligibility of Region 17 rather than to its status as an accredited

Four-Channel Limitation. Neither Region 17 nor Frenship is the licensee of, or has filed applications for, additional ITFS channels in the Lubbock, Texas area. Consequently, each is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. Where amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. *Hispanic Information and Telecommunications Network, Inc.*, F.C.C. 92-411 at 2 (released Sept. 10, 1992). Region 17's amended illustrative schedule, submitted on April 1, 1991, 14 days prior to the "B" cut-off date, indicates an average of 25.625 hours of formal educational programming per channel per week, while its programming grid indicates an average of 41 hours of formal educational programming per channel per week.[5] Thus, Region 17 is entitled to one programming merit point.

Frenship's illustrative schedule proposes an average of 15.75 hours of formal educational programming and 18.5 hours of non-formal ITFS programming per channel per week, while its programming grid proposes an average of 15.5 hours of formal educational programming and 18.75 hours of non-formal ITFS programming per channel per week. Accordingly, Frenship is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither Region 17 nor Frenship is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Region 17 is entitled to points for being local, for being accredited, for observing the four-channel limitation, and for proposing at least 21 hours of formal educational programming, for a total of 10 points. Frenship is entitled to points for being local, for being accredited and for observing the four-channel limitation, for a total of nine points. Thus, the selectee is Region 17.

OTHER MATTERS

6. Region 17 proposes to lease its excess capacity for non-ITFS use as permitted by Section 74.931, and has submitted a copy of its lease with United States Wireless Cable, Inc., which conforms in all respects with Commission requirements. Additionally, there are no petitions to deny Region 17's application, and we find Region 17 to be fully qualified.

7. Accordingly, IT IS ORDERED, That the application of Region 17 Education Service Center (BPLIF-901024DP) IS GRANTED, and the application of Frenship Independent School District (BPLIF-910114DA) IS DENIED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

entity entitled to accreditation merit points. As noted above, Region 17 is fully eligible since it is a governmental entity whose primary function is the formal education of students enrolled in its member schools. *See* 47 C.F.R. §74.932(a). Second, in order to be awarded merit points, the applicant must be accredited in its own right, as is Region 17. *See Second Report and Order*, 101 F.C.C. 2d, at 69. Moreover, Region 17 also qualifies for accreditation points because it is a directly controlled arm of the Texas State Board of Education whose specific duties include the Board's educational function. 47 C.F.R. §74.913, Note 1.

[5] Region 17 submitted a further amended schedule on April 27, 1992, adding ditto marks below some of the amended schedule's titles, thereby indicating these programs' lengths as one hour instead of 30 minutes, for a total of 41 hours of formal educational programming. However, we cannot consider this clarification amendment, which would qualify Region 17 for two programming merit points, because minor amendments resulting in a comparative advantage must be filed prior to the "B" cut-off date, which was April 15, 1991. *Second Report and Order*, 101 F.C.C. 2d at 74. Even if Region 17's second amendment were timely filed, its excess capacity lease with United States Wireless Cable, Inc., as filed prior to the "B" cut-off date, would not permit it to transmit more than 40 hours per channel per week without jeopardizing the agreement.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-111

In re Applications of

DEAS COMMUNICATIONS, INC. File No. BPH-910208MB

HEALDSBURG BROADCASTING, INC. File No. BPH-910211MB

HEALDSBURG EMPIRE CORPORATION File No. BPH-910212MM

For Construction Permit for a
New FM Station on Channel 240A
in Healdsburg, California

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 1992; Released: October 21, 1992

By the Review Board: BLUMENTHAL and GREENE. Board Member ESBENSEN absent.

1. The Board has before it the "Appeal" of Healdsburg Broadcasting, Inc. (Appellant) from the *Memorandum Opinion and Order* (*MO&O*), FCC 92M-874, released August 13, 1992 by Administrative Law Judge Edward J. Kuhlmann (ALJ), which dismissed appellant's application.[1] It also has the "Oppositions" to that appeal filed by Deas Communications, Inc. (Deas) and the Commission's Mass Media Bureau. In brief, the *MO&O* dismissed appellant's application after rejecting its engineering amendment of July 16, 1992.

BACKGROUND

2. The *Hearing Designation Order* (*HDO*), 7 FCC Rcd 3135 (M.M. Bur. 1992), noted that appellant's engineering showing reflected a violation of 47 CFR Section 73.215 in that appellant's signal contour would improperly overlap the protected contour of KKHI-FM. Despite that "violation," and in part because the *HDO* acknowledged that our measurement rules may be "somewhat unclear," the *HDO* did not dismiss appellant's application but permitted an amendment to be filed with the ALJ. 7 FCC Rcd at 3161.[2]

3. On June 19, 1992 (and within the requisite 30 days of the release of the *HDO*), appellant submitted an amendment to cure its signal contour overlap problem. However, in reviewing that amendment, the Bureau for the first time observed that appellant's engineering was not in conformance with 47 CFR Section 73.316(b)(2) relating to azimuth radiation patterns for directional antennas. Responding to a request that appellant Show Cause why its application should not be dismissed because of this latter inconformity, appellant filed a corrective amendment on the same day the Show Cause order issued, July 16, 1992. Appellant asserts [3]:

> In Attachment 1 to HBI's Show Cause Response, Benjamin Dawson, one of HBI's consulting engineers, demonstrated that the August 13, 1991 engineering Pattern Envelope information (Attachment 2 at pages 2-3 of the HBI Show Cause Response) provided [HBI engineer] Mr. Petersen, by Jampro [manufacturer], contained typograghical errors which directly conflicted with Jampro representations to Mr. Petersen in information it provided on August 7, 1991 -- that the slope of the Jampro antenna pattern "will comply with known FCC rules" so that "a protection null will not exceed 2 dB per 10 degrees azimuth." *See* Attachment 2 to the HBI Show Cause Reponse at p.1, the August 7, 1991 Jampro Antenna Data. As Mr. Dawson further indicated in his engineering statement, and as Mr. Dye confirmed in his declaration, although the antenna pattern was intended by Jampro to be symmetrical around the 150 degree bearing, Jampro's typing error resulted in a relative field of 0.64 rather than 0.62 in the relative field value for 190 degrees, resulting in incorrect interpolated values for 185 and 175 degrees in the June 19, 1992 HBI amendment. *See* Attachments 1-3 of HBI Show Cause Response. Jampro provided the corrected data table and pattern plot, Attachment 5 to the HBI Show Cause Response, and HBI corrected the 0.02 relative field value error in a corrected amendment which was filed with a Petition For Leave To File Corrected Amendment concurrent with HBI's Show Cause Response.

Nonetheless, the ALJ held that appellant should be dismissed for "violating the 'hard look' policy and for failing to establish good cause for its violation." *MO&O* at para. 8.[4] This appeal followed.

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[1] This appeal lies as a matter of right. 47 CFR Section 1.301(a)(1).

[2] The *HDO* also dismissed an engineering amendment filed by appellant on September 25, 1991 because of a conflict between a directional pattern tabulation and appellant's sketch. 7 FCC Rcd at 3136 & n.5. That error was corrected.

[3] Appeal at 2-3 (footnote omitted).

[4] *See also id.*, where the ALJ opined:

> Under the "hard look" doctrine it is not up to the processing line to identify defects; that is the applicant's obligation and responsibility. The issue is not as HBI presents it, that only easily noticeable problems are subject to the "hard look." HBI, as the Commission has repeatedly stated, had the obligation to insure that its proposal complies with the rules. If the people that HBI hired to assist in preparing its technical proposal did not check it for compliance with the rules, that is not an excuse. As it turns out, HBI's technical proposal violated more than one Commission rule. From the circumstances

APPEAL

4. Appellant urges: (1) that the correction of its application caused by a manufacturer's typographical error, only twelve days after its revelation, met the Commission's six-point "good cause" test as set forth in 47 CFR Section 73.3522 and *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970); and (2) that the error at issue would not have triggered dismissal under the "hard look" policy. Citing *Magdalene Gunden Partnership*, 2 FCC Rcd 5515, 5513 (Rev. Bd. 1987) [5] and *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982), appellant argues that its error was less serious than the city grade coverage and geographic coordinate errors corrected, respectively, in those cases, and it maintains that "[t]he *Hard Look Processing Guidelines* do not state that a minor violation of Section 73.316(b) renders an application either untenderable or unacceptable for filing."[6]

5. Abandoning the argument made before the ALJ that the *HDO* itself absolutely precluded any consideration of the amendment,[7] the Bureau now argues -- apparently for the first time[8] -- that *Hard Look* is implicated because, in counsel's "opinion," had the Section 73.316(b)(2) defect been discovered on the processing line, appellant's application would not have been designated for hearing but returned as "unacceptable for filing." [9] The Bureau further contends that since "[t]he need to comply with the Commission's rules is always foreseeable,"[10] appellant cannot meet the "good cause" test engineering amendments.

6. Deas echoes the Bureau's reasoning, but relies as well on 47 CFR Section 73.3566(a) of the Rules for the proposition that applications that are "patently not in accordance with FCC rules ... will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.[11] Citing *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990), Deas also submits that appellant's deficiency under Section 73.316(b)(2) was "foreseeable," and that appellant cannot therefore meet the "good cause" test for post-designation amendments.

DISCUSSION

7. *Hard Look Policy.* The questions concerning if, when, and how the old *Hard Look* policy (*see supra* note 6) should be reconciled with the traditional "good cause" test for post-designation amendments set forth in Section 73.3522(a) of the Rules have received much recent treatment. Thus, in *Taber Broadcasting Co.*, 4 FCC 7892, 7893 (1989)(original emphasis), the Commission distinguished prior cases in which it had accepted *engineering* amendments and it rejected an amended *signature page* by stating:

> The tenderability component of the "hard look" standard is intended to detect and eliminate *applications* which at the *initial* stage of processing, contain fundamental errors in key portions therein, in favor of applicants who through compliance with the tenderability standard demonstrate that they are "ready, willing and able" to institute broadcast service. *See Report and Order*, 50 Fed. Reg. at 19940. Subsequent amendments are not required to conform to the tenderability requirements. Nothing in the letter or spirit of the *Report and Order* suggests that its requirements should be so extended.

8. Because it seemed clear that the Commission intended, in the language of *Taber*, that *Hard Look* was intended to be applied only during the "*initial* stage of processing," the Board later held:

> It is clear that these new [*Hard Look* Order] processing guidelines were and are intended to be applied at the *initial* staff review stage, and nothing in the Commission's discussion of its "hard look" policy suggests that it is to be again utilized once the hearing process has begun. Insofar as we are aware, the singular standard for application amendments, once a hearing has been designated, remains as set forth in Section 73.3522(b) of the rules, 47 CFR Section 73.3522(b); under that standard, minor ministerial mistakes that do not disrupt the hearing proceeding are rather freely permitted. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988)(subsequent history omitted); *see also Family Broadcasting Group*, 93 FCC 2d 771, 774-775 (Rev. Bd. 1983), *review denied*, FCC 83-559, released November 29, 1983. We shall not unilaterally extend, or apply retroactively by our own ukase, the processing standard established expressly for *initial* staff review of a broadcast application.

George Henry Clay, 5 FCC Rcd 317, 318 (Rev. Bd. 1990)(original emphasis). *See generally also Leland Broadcasting Group, Inc.*, FCC 92-368, released August 21, 1992 at para. 9 ("the Bureau correctly noted that the *"hard look"* processing standards do *not* apply to *amendments,"*

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presented here it is evident that HBI did not exercise due diligence. HBI had years to review its proposal and following release of the HDO it had notice that all was not right and that it was vulnerable to dismissal. The error was not esoteric since the required showing is governed by rule and there is no evidence a violation of the Commission's technical rules is *de minimis*. The Bureau has indicated that HBI's failure to comply with Section 73.316(b)(2) would have resulted in HBI's application being dismissed if it had been discovered before designation of this case for hearing.

[5] *Aff'd, Marin TV Services Partners, Ltd. v. FCC*, 936 F.2d 1304 (D.C. Cir. 1991).

[6] Appeal at 5, citing *Statement of New Policy Regarding Commercial FM Applications ("Hard Look" Guidelines)*, 58 RR 2d 166, 168 (1985). For the reasons set forth therein, the Commission just recently modified its 1985 *Hard Look* approach, *see Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992), but it there stated that the 1985 *Hard Look Guidelines* would continue to be applied to applications filed prior thereto. *See RDH Communications, Limited Partnership*, FCC 92-379, released August 31, 1992 at n.1.

[7] *See MO&O* at paras. 4-7. We agree with the ALJ. An *HDO* is controlling with respect to a dispute where "specific reasons are stated for [the Commission's] action or inaction in a designation order...." *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966). The instant *HDO* does not discuss, let alone resolve, questions concerning Section 73.316 of the Rules.

[8] See Appeal at 5 & n.9.

[9] Bureau Opposition at 3 & n.3.

[10] *Id.*, at 4.6

[11] Deas Opposition at 3 (quoting Section 73.3566(a)).

citing *Taber)* (emphasis added); *American Indian Broadcast Group, Inc.*, FCC 92-390, released August 28, 1992 at para. 7 ("the Commission has held that the *hard look* tenderability requirements do *not* apply to *amendments*," citing *Taber)* (emphasis added).

9. However, shortly after we issued *George Henry Clay*, the Commission pronounced further on the interplay between *Hard Look* and post-designation amendments. In what seemed to the Board not entirely inconsistent with *Clay*, the Commission declared:

> Although the "hard look" processing procedures did not alter the standards for acceptance of post-*designation amendments*, the policy and precedent associated with the "hard look" necessarily affect the good cause analysis to which post-designation amendments are subject, since otherwise the acceptance of post-designation amendments would undermine the benefits of "hard look."

Pueblo Radio Broadcasting Service, supra, 5 FCC Rcd at 6279 (1990)(emphasis added).

10. Having announced in *Pueblo* that post-designation amendments should be regarded *both* under *Hard Look* and "good cause," the Board then interpreted *Pueblo* by relating:

> That is, while *Hard Look* processing standards are not applied, *per se*, at the post-designation stage, a stage governed by Section 73.3522(b), any attempt to amend a defective application that implicates *Hard Look* deficiencies will be considered in "good cause" determinations, particularly under the "due diligence" prong.

SBM Communications, Inc., 6 FCC Rcd 6484, 6485 (Rev. Bd. 1991). That formulation was not disturbed in the Commission's review of *SBM*, *see* 7 FCC Rcd 3436 (1992), but the Commission did drop a footnote that states:

> In *George Henry Clay*, 5 FCC Rcd 317, 318 para. 4 (Rev. Bd. 1990), which was not reviewed by the Commission, the Review Board asserted that the "hard look" rules are "legally immaterial" at the post-designation stage of an adjudicatory proceeding. However, in *Pueblo*, 5 FCC Rcd at 6279 para. 6, we stated that the policy and precedent associated with the "hard look" rules necessarily affect the good cause analysis of any post-designation petition for leave to amend a deficient application. Thus, we agree with the Bureau that any post-designation attempt to cure either tenderability or acceptability defects must be analyzed in light of both pertinent "hard look" requirements and ordinary good cause considerations in order to avoid undermining the benefits of the "hard look" policy. *Id.* Consequently, we specifically disavow the Board's holding in *Clay*. Amendments perfecting the tenderability or acceptability of an application after designation for hearing require a showing in light of both the "hard look" rules and the good cause requirements of 47 CFR Section 73.3522(b)(1). *See Pueblo*, 5 FCC Rcd at 6278-79 paras. 5-6.

7 FCC Rcd at 3437-3438 n.5. We are bound by that footnote in the Commission's *SBM*.

11. Notwithstanding the facially flat language of *Taber*, *Leland Broadcasting* and *American Indian Broadcast Group* suggesting that *Hard Look* is inapplicable to amendments, we are informed further by *Pueblo* and the Commission's *SBM* explication of its critique of *George Henry Clay* that, in contemplating post-designation amendments, we must also consider whether the amendment perfects a "tenderability" or "acceptabililty" defect under *Hard Look*. We must then factor that matter into our "good cause" analysis (although the precise mechanics of this dual exercise have yet to be fully fleshed out).

12. In the case before us, not even the Bureau argues that appellant's application suffers from a threshold "tenderability" defect. *Compare, e.g., SBM*, where in the wake of *Mary Ann Salvatoriello*[12] an application bearing only a facsimile signature was dismissed after hearing designation for lack of a tendered amendment (or, of course, a "good cause" showing). *Compare also Pueblo*, where a post-designation amendment seeking to overcome a U.S.-Mexico Treaty violation was rejected and the application was summarily dismissed as "unacceptable for filing." Pursuant to the Commission's instructions in *Pueblo*, and recalling that the Board does not apply "hard look," *per se*, but merely factors the underlying policy into our larger amendment decisions, we now move to the question of whether appellant's particular error would, with clear precedential support, warrant the draconian remedy of summary dismissal even as late in the process as the hearing stage.

13. We have reviewed the *Hard Look* and its guidelines and find the following with respect to "unacceptability":

> An application found to be sufficient for tender will be studied to determine its acceptability for filing, that is, to determine whether it is in compliance with applicable Commission rules. If it is found acceptable for filing, it will be included in a Public Notice of Acceptance. If found to be unacceptable for filing, it will be returned and will not be accepted later on a *nunc pro tunc* basis.

58 RR 2d at 169 (Appendix D). This says nothing about *post*-designation amendments. Moreover, the precedent shows that the merely because an application may contain a technical error, the Bureau does not automatically dismiss: in fact it frequently invites later amendments before the ALJ. *See, e.g., Peter J. Rinaldi*, 5 FCC Rcd 5649 (M.M. Bur. 1990); *Caprock Educational Broadcasting Foundation*, 5 FCC Rcd 5170 (M.M. Bur. 1990); *Patrick H. Robinson*, 5 FCC Rcd 5146 (M.M. Bur. 1990); *Charles J. Saltzman*, 2 FCC Rcd 4449 (M.M. Bur. 1987); *McDowell Broadcasting Corp.*, 2 FCC Rcd 3283 (M.M. Bur. 1987). *Cf. Key Broadcasting Corp.*, 2 FCC Rcd 3888 (M.M. Bur. 1987)(applicant fails to complete ownership section as required in Appendix D; despite "patent" defect, applicant allowed to amend before ALJ).[13] Thus, even if the Board were instructed to

[12] 6 FCC Rcd 4705 (1991).

[13] We recognize that in the recent *Leland Broadcast Group*, *supra* para. 8, the Commission held that merely because excused errors in previous cases were "arguably more serious than the

apply *Hard Look* "acceptability" guidelines, *per se*, to *post*-designation amendments (which it is not, *see Pueblo, supra)*, we could not now say that this applicant had adequate notice that *its* error would automatically trigger summary dismissal, even *after* hearing designation. Nor can we accept as a substitute for such very clear notice the Bureau's *post-hoc, post*-designation "opinion" that, *had* the processing staff unearthed this technical error, appellant's application would have been summarily returned. *Compare Malkan FM Associates*, 935 F.2d 1313 (D.C. Cir. 1991), where the panel majority held that dismissal of an application in the *pre*-hearing stage was justified because of adequate notice of the U.S.-Mexico treaty in Appendix D of the *"Hard Look" Guildelines.*[14] But as the case law shows, sometimes the Bureau dismisses applications with technical errors; and sometimes it doesn't. *Cf. Lopez Radio, Inc.*, 7 FCC Rcd 5320 (1992) (cases discussed in paras. 4-5 thereof ("minimal nature of [technical] defects" not grounds for "unacceptability"; amendments permitted to correct computation errors)). Since the Bureau points to no published case where an applicant has been summarily dismissed for a Section 73.316(b)(2) error, we will not second-guess the processing line at this late stage, nor should appellant (or any applicant) be required to do so.

14. For much the same reason, we rebuff Deas' plea grounded in Section 73.3566(a) of the Rules. Like the Bureau, Deas' points to nothing specific in the *"Hard Look" Guidelines* suggesting that an error in the data submitted under Section 73.316(b)(2) will automatically result in summary dismissal even *after* designation, nor does it dispute appellant's factual explanation for the error. Rather it argues that, although *post-hoc*, the Bureau is of the "opinion" that appellant's application was "unacceptable for filing" and was so "patent" that "any trained engineer could have immediately spotted the error." *See MO&O* at para. 5. But as appellant observed to the ALJ, "four sets of engineers failed to see the problem," *id.*, at para. 6, including the FCC's "trained engineers" as well as Deas' engineers, and the *HDO* makes no reference to it. Hence, it is not surprising that the Bureau itself does not rely upon Section 73.3566(a) as a basis for summary dismissal at this stage. Indeed, by the great weight of its own precedent (*see supra* para. 13), many more "patent" application errors have not triggered summary dismissal, even under *Hard Look* and even *prior to* designation. Having performed our own "hard look" analysis pursuant to *Pueblo*, we now turn to the question of "good cause."

15. *Good Cause*. A party seeking to amend once a hearing has been designated must meet the "good cause" test mandated by Section 75.3522(b) of our Rules, as interpreted in *Erwin O'Conner, supra*. Thereunder:

> the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

22 FCC 2d at 143 (Rev. Bd. 1970). *Accord, Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1028 (Rev. Bd. 1983) (aff'g amendment rejection), 95 FCC 2d 444 (aff'g dismissal of same applicant), *review denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce Int'l. Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985), *cert. denied* 474 U.S. 995 (1985). Perforce, and because engineering amendments may be very disruptive of a multiparty comparative licensing case once the applications have been scrutinized and processed by our Mass Media Bureau engineers, the "good cause" test of *O'Conner* is braced by an additional burden under Section 73.3522(b)(i), to wit:

> That the amendment is necessitated by events which the applicant could not reasonably have foreseen (*e.g.*, notification of a new foreign station or loss of transmitter site by condemnation)...

The case law interpreting these strictures has just been reviewed in *Radio Lake Geneva Corp.*, FCC 92R-72, released September 3, 1992, and we incorporate that extensive analysis here.

16. Initially, and inasmuch as nobody disputes appellant's version of the facts, we find no greater basis to hold that appellant's error here was any more "foreseeable" than was the engineering error in *Magdalene Gunden Partnership, supra.*[15] When affirming *Gunden*, the court observed:

> In defending its decision to allow North Bay's amendment, the Commission argues before this court that North Bay could not have foreseen the need to amend its application because it relied in good faith on its engineer's expertise. North Bay should not be penalized, the Commission contends, because of its engineer's error regarding a highly technical matter. This approach to the foreseeability issue seems inconsistent with the FCC rules that require the applicant, and not the engineer, to provide data supporting the feasibility of its application. *See* 47 CFR Sections 73.3513-73.3516. If an applicant were allowed to shield itself from errors by relying on expert opinions, the potential for abuse would be great. We need not determine whether this policy is in line with FCC rules, however, because the Board did not invoke it here. As we noted, the Board, unlike the ALJ, allowed the amendment because it concluded that *the expert* could not have reasonably foreseen the site issue - not because North Bay relied on its expert's opinion.

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defect" there, it was not bound to excuse that applicant's failure to submit a proper site map. *See* FCC 92-368 at para. 9. However, the *Leland* applicant "admitted that its site map failed to meet the specified requirements" set forth in a special *Public Notice*. There is no special *Public Notice* admonishing against appellant's error here.

[14] *Pueblo* extended that same *Hard Look* principle to *post*-designation amendments to cure this Treaty defect.

[15] Indeed, not only does the Bureau often encounter (and allow later amendment, (*see supra* para. 13), many engineering errors a great deal more "foreseeable," it could not apply its facile principle to the *HDO* in this very case and pass its own theoretical muster, since the *HDO* acknowledged and excused one inconsistency with the Rules and entirely missed the error under Section 73.316(b)(2) that it now implies was eminently "foreseeable."

Marin TV Services Partners, supra note 5, 936 F.2d at 1307 (original emphasis). Even disregarding the fact that the Bureau's present postulate that "[t]he need to comply with the Commission's rules is always foreseeable," albeit based on an engineer's error, is antipodal to what the Commission argued in *Marin*, we find appellant's engineering error to be no more "foreseeable" than the technical error discussed in *Marin*. The Bureau's glib dismissal of *Marin* consists of its breezy claim that "the facts are so dissimilar," but it offers no explanation whatever for the claimed dissimilarity other than to repeat its conclusory "opinion" that appellant's "amendment was clearly unacceptable for filing and could have been dismissed by the processing line." But this theory presupposes that the Board is to apply *Hard Look, per se,* and at industrial strength at this late stage.[16] This will not wash, *Pueblo*, and we find no rational basis upon which to hold that the error here should be treated more harshly than, if anything, the more "foreseeable" technical error in *Gunden*. Under the unrefuted facts at bar, we find that appellant has met the hurdle erected by Section 73.3522(b)(i). We move next to the standard *O'Conner* test.

17. Because appellant acted within twelve days of discovery of its error and on the very day the Show Cause Order issued, we needn't spend much time on the key question of "diligence." *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982)(due diligence runs from time applicant is or should have been alerted to the defect). Rarely are amendments tendered so swiftly. Similarly, inasmuch as nobody disputes appellant's version of the facts, it is found that appellant was correcting an inadvertance and not purposely changing its directional antenna proposal. Neither would accepting the amendment have required the modification or addition of hearing issues, nor disrupted the hearing. So far as the record shows, nobody has challenged appellant's corrected computation. Finally, acceptance of the amendment would not have legally "prejudiced" Deas,[17] and no comparative advantage would have accrued to appellant. Consequently, appellant in our view does not fail the "good cause" test under any prong.

CONCLUSION

18. In reversing the *MO&O*, we do not especially fault the ALJ, for the Bureau's interpretation and implementation of the old *Hard Look* regime has been confused and confusing to all concerned.[18] The Bureau's multifarious contentions in this case offer a vivid example. First it argued to the ALJ that appellant's correction of its Section 73.316(b)(2) computation error was absolutely barred by the *HDO*, a rejected argument not even proffered again to the Board. Second, it instead submits to us its *post-hoc* "opinion" that, *had* the error been detected on the processing line, appellant's application would have been dismissed automatically as "unacceptable for filing," though it cites nothing in *Hard Look Guidelines* that says that specifically nor any case on this rule. (Nor does Deas.) Third, and failing to support that theory, the Bureau retreats to the all but frivolous proposition that, because "[t]he need to comply with the Commission's rules is always foreseeable," no engineering amendment can survive Section 73.3522(b)(i), thus disregarding this very *HDO* and years of engineering amendment precedent (much of it emanating from the Bureau).

19. Over and above these immediate failings, the Bureau concurrently ignores two of the most cardinal precepts in administrative law. If there is one critical mistake that ensures a reversal by the judiciary, it is the failure to explain rationally an agency action and/or to distinquish prior precedent. *See, e.g., Marin TV Services Partnership*, 936 F.2d 1309-10 at (case remanded for lack of rational explanation of treatment of ownership/management integration); *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992)(same); *Ventura Broadcasting Co. v. FCC*, 765 F.2d 184 (D.C. Cir. 1985)(decision vacated for lack of rational explanation of spousal attribution); *Cf. Northampton Media Associates v. FCC*, 941 F.2d 1214, 1217 (D.C. Cir. 1991)(agency criticized for lack of rational explanation of treatment of financial documentation). The Bureau offers utterly no explanation, let alone a rational one, as to why we should treat this error differently from that in *Gunden* insofar as "foreseeability." We won't.

20. Equally as egregious is the Bureau's disregard of the court's repetition of another bedrock principle:

> [F]undamental fairness ... requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by *full* and *explicit* notice of all prerequisites for such consideration. *Id.* at 871-72 (emphasis supplied); *see also Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.)("[E]lementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected."), *cert. denied*, 429 U.S. 895 (1976); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)("When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.").

Malkan FM Assoc., supra, 935 F.2d at 1318-19 (internal quotes omitted). Here the Bureau would impose what Judge Williams called in that case the "sudden death" of dismissal (dissenting opinion), notwithstanding that unlike *Malkan* where the court allowed pre-hearing dismissal, no clear notice forewarned of a similar consequence for a *de minimis* miscomputation under Section 73.316(b)(2) once a hearing has been designated. Where explicit notice is lac-

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[16] *See* Bureau Opposition at 5.

[17] *Cf. Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978)(opponent has no "vested interest" in disqualification), cited in *Radio Lake Geneva Corp., supra*, at para. 15.

[18] A singular illustration of this condition can be had by comparing the Bureau's position in this case with its position in *Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991). While the Bureau would here preclude an applicant from correcting a relatively minor technical error, it insisted in *Radio Associates* that an applicant be permitted to amend after designation to provide, without the *barest* "good cause" showing, a financial proposal 2 1/2 years after it had certified its application to swear it had *no* finances. *Non sequitur*. (Although *Radio Associates* was not reviewed, the Commission just cited and relied upon that case. *See* Brief for Appellee at 9-13, *Sharron Annette Haley v. FCC*, No. 91-1410 (D.C. Cir.); Brief for Appellee at 4 & n.2, *Prater & Durham v. FCC*, No. 91-1409 (D.C. Cir.). We have little doubt that the Commission's recent modification of *Hard Look, see supra note* 6, was intended, in part, to improve the situation.)

king, the court will simply not sustain an abrupt dismissal, even *before* hearing designation. *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985).[19]

21. Henceforth, the Board will not entertain claims of an absolute amendment bar under *Hard Look* unless clear and express notice warns that a particular deficiency will invariably provoke automatic summary dismissal. *See generally, e.g., Pueblo, supra.*[20] Apart from that, we will not permit a party to come in through the back door (*i.e.*, *post*-hearing designation) with an attempt to push an applicant back through the front door of *Hard Look* after it has paid its application fee, survived Bureau processing, paid a hearing fee and incurred legal and engineering expenses, *etc.*[21] We do not believe that this clear and specific notice requirement "undermines" the purposes of *Hard Look*, but merely implements the reasonable demands of *Salzer* and *Malkan*. Following the Commission's advice in *Pueblo*, we will shift the focus of our attention to Section 73.3552, the rule governing *post*-designation amendments, and apply engineering amendment precedent of long-standing.

22. ACCORDINGLY, IT IS ORDERED, That the amendment filed by Healdsburg Broadcasting, Inc. on July 16, 1992, IS ACCEPTED; its Appeal filed August 20, 1992, IS GRANTED, and its application (File No. BPH-910211MB) IS REINSTATED in this proceeding).[22]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

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[19] Because we find that no specific rule or case plainly bars the subject amendment, we do not trangress the teaching of *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986)(agency may not ignore its rules to achieve "equitable" result).

[20] In the case at bar, it's possible that the Section 73.316 defect was not present in appellant's application as filed, but was introduced in the September 25, 1991 amendment that was dismissed in the *HDO* by the Bureau's processing line without consideration of that error. Although not argued by parties, appellant's July 19, 1992 amendment at issue here more closely resembles a "defective" amendment, *see, e.g., Taber*, rather than a "curative" one, since the particular deviation introduced thereby was not present in the original application. This suggests that "hard look" may be completely inapposite to this case. Pueblo and *SBM* may also be distinguishable from the instant case because they address the applicability of "hard look" to amendments attempting to cure defects, in *Pubelo* an "acceptability" defect and in *SBM* a "tenderability" defect, present in the underlying applications considered by the processing line. Here, because the Section 73.316 error might not have been part of appellant's application while it was before the Bureau during the pre-designation stage of this proceeding, but introduced in an amendment directed to the ALJ, it is also possible to conclude that, consistent with *Pueblo* and *SBM*, the "hard look" policy is not at all apposite here. We do not decide.

[21] *Cf. Communi-Center Broadcasting Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988)(law disfavors flash dismissals; strong justification must support dismissal rather than resolution on merits).

[22] We are making prepublication copies available to the ALJ and party counsel.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 13, 1992

Report No. DS-1244

DIGITAL AUDIO RADIO SERVICE SATELLITE SYSTEM APPLICATION ACCEPTABLE FOR FILING CUT-OFF ESTABLISHED FOR ADDITIONAL APPLICATIONS

Comments: November 13, 1992
Replies and Oppositions: December 1, 1992
Responses: December 15, 1992
Applications Cut-off: December 15, 1992

The Commission has found, upon initial review, that the following application filed by Satellite CD Radio, Inc. (CD Radio) for authority to construct, launch and operate a digital audio radio service satellite system is acceptable for filing. The Commission reserves the right to return this application, however, if, upon further review, it is determined that it is defective or not in conformance with the Commission's rules, regulations and policies.

Satellite CD Radio, Inc.	File Nos. 49/50-DSS-P/LA-90 58/59-DSS-AMEND-90 44/45-DSS-AMEND-92

Application for authority to construct, launch and operate a digital audio radio service consisting of the following: two geostationary satellites, an undetermined number of complementary urban-area terrestrial repeaters to be implemented after 5 years, an earth station for feeder links and for telemetry, telecommand and control and numerous individual, fixed or mobile radio receivers. The system is intended to provide high rate digital information to subscribers including applications such as compact disc quality audio programming throughout the U.S. CD Radio proposes to uplink programming from its feeder link station using the 7035-7055 MHz frequency bands. The signals will be downlinked to the individual receivers using the 2310-2360 MHz frequency bands. CD Radio proposes to offer its service on a non-common carrier, non-broadcasting basis, providing subscription or pay-per-listen services.

Comments or petitions regarding CD Radio's application may be filed on or before **November 13, 1992.** Replies and oppositions may be filed on or before **December 1, 1992.** Responses may be filed on or before **December 15, 1992.**

Interested parties wishing to file applications for U.S. domestic digital audio radio service satellite systems to operate in the downlink frequency band of 2310-2360 MHz to be considered concurrently with CD Radio's may do so on or before **December 15, 1992.** Each applicant must file a concrete, comprehensive proposal for its proposed system, describing in detail all pertinent technical and operational aspects of the system, the proposed services and its ability to proceed expeditiously with construction and launch, together with the appropriate application fees and the Fee Form 155. In particular, applicants shall provide all information specified in Appendix B of *Space Station Filing Procedures*, 48 Fed. Reg. 40256 (September 6, 1983) as appropriate. (*See also* 47 CFR 25.114) Applications that fail to comport with these requirements as of the cut-off date will be dismissed as unacceptable for filing. Applicants filing by the cut-off date will be afforded an opportunity to amend their applications, if necessary, to conform with any requirements and policies that may be adopted for digital audio radio service satellite systems.

For further information, contact Rosalee Chiara at 202-634-1781.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-236

In the Matter of

United Telecommunications, Inc.	Transmittal Nos. 300, 302 and 303
Revisions to Tariff F.C.C. No. 5	

MEMORANDUM OPINION AND ORDER

Adopted: October 9, 1992; Released: October 9, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 14, 1992, United Telecommunications, Inc. (United) filed Transmittal No. 300, to offer an out-of-band signalling service using Signalling System 7 (SS7). In addition, United plans to extend its existing Common Channel Signalling (CCS) Interconnection Service to other jurisdictions. United currently provides this service only in Tennessee.[1] Transmittal 300 is scheduled to take effect on October 13, 1992.

2. According to United, out-of-band signalling will offer customers more efficient use of the switched access network, faster call set-up and completion, fraud reduction, and a greater capability to support new services.[2] United plans to establish two subelements for its CCS interconnection charge. The first subelement is an Access Link Charge, designed to recover the costs of a 56 kilobit per second (kbps) channel connecting the out-of-band signalling customer's premises with United's Signal Transfer Point (STP). The second subelement is the STP port charge, designed to recover the costs of the physical port in United's STP.[3] MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend and investigate Transmittal 300, and United filed a reply. For reasons set forth below, we grant MCI's petition in part and suspend Transmittal 300 for one day, in order to initiate an investigation of United's STP port charge element of its CCS interconnection charge.

II. PLEADINGS

3. MCI considers it "laudable" that United plans to offer out-of-band signalling as a non-chargeable option. However, MCI considers the technical specifications in Transmittal 300 to be unreasonably vague. According to MCI, United does not state specifically that it will offer out-of-band signalling under the terms and conditions outlined in the Bell Communications Research (Bellcore) Technical Publication for SS7-related services, TR-TSV-000905, or that it will follow certain technical standards, such as those established by the American Network Standards Institute (ANSI).[4] MCI asserts that it is not clear whether United will provide Charge Number, Originating Line Information, or the Carrier Identification Code. MCI Petition at 3. United responds that its tariff language is sufficient to explain that out-of-band signalling will be offered under the terms and conditions of the referenced technical publication. United Reply at 3. United asserts that its Common Channel Signalling technical standards are explained in Section 6.1.3. of its tariff. *Id.* United asserts that Charge Number and Originating Line Information will be available, and that it does not understand what MCI is referring to with respect to the CIC parameter. United also maintains that if these parameters were absent, that would not justify rejection or suspension of Transmittal 300. *Id.* at 3-4.

4. MCI criticizes United's requirement that interexchange carriers (IXCs) interconnect to its network only at STPs, and requests that out-of-band signalling be made available with Feature Group B. MCI Petition at 3-4. United argues that it cannot permit CCS interconnection at points other than STPs at this time for network security reasons, and it cannot offer out-of-band signalling with Feature Group B at this time because technical standards have yet to be developed. United Reply at 5.

5. Finally, MCI opposes the imposition of nonrecurring charges (NRCs) for installation of out-of-band signalling and the Calling Party Number and Carrier Selection Parameter optional features. MCI requests that these NRCs be eliminated, or at least waived for the initial migration of a customer from multifrequency signalling to out-of-band signalling. MCI Petition at 4. MCI claims the Calling Party Number and Carrier Selection Parameter NRCs are especially unreasonable, because MCI believes United will recover the costs associated with installation of Calling Party Number and Carrier Selection Parameter through recurring rates. *Id.* at 4-5. United argues that its NRCs are reasonable, and necessary to insure that its costs are recovered from the cost causers. United Reply at 5-6.

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[1] *See* United Telecommunications, Inc., Transmittal No. 287, effective Jan. 1, 1992. *See also* Local Exchange Carrier Line Information Database, Order, 7 FCC Rcd 525 (Com.Car.Bur. 1991) (*LIDB Investigation Order*).

[2] United Description and Justification (D&J) at 1-4 to 1-5.

[3] *Id.* at 1-7 to 1-8.

[4] MCI Petition at 2-3. In its reply to MCI's petition against Transmittal 300, United maintains that it was granted a waiver of Section 61.74(a) in November 1991 in order to refer to Technical Publication TR-TSV-000905 in connection with United's LIDB tariff filing. Under the terms of that waiver, according to United, no additional technical specifications are required. United Reply at 2. On September 24, 1992, however, United requested a waiver of Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, to refer to this technical publication in Transmittal 300. The technical publication at issue here is the same as that for which we granted a waiver of Section 61.74 in the LIDB context. As in that context, we conclude that United has provided good cause for waiver, within the meaning of Section 1.3 of the Commission's Rules.

III. DISCUSSION

6. The Common Carrier Bureau has reviewed the United transmittal, MCI's petition, and United's reply. We conclude that no compelling argument has been presented that the out-of-band signalling offering is patently unlawful so as to warrant rejection, or that an investigation of that offering is warranted at this time.[5]

7. We will, however, investigate United's CCS interconnection charges. Transmittal 300 raises substantial questions of law and fact which require further investigation to determine whether the rate levels are excessive and whether the terms and conditions are reasonable. Accordingly, we suspend Transmittal 300 for one day in order to investigate United's CCS Interconnection Charge. Transmittal 300 will therefore become effective on November 13, 1992, following a one-day suspension, subject to an accounting order to facilitate any refunds that later prove necessary.

8. We will investigate the following issues:

(1) Bell Communications Research, Inc., (Bellcore) has developed a cost model called "Common Channel Signalling Cost Information System" (CCSCIS). To the extent United relied on CCSCIS to develop its rates, it must explain why use of such a model is appropriate.

(2) To the extent United did not use CCSCIS to allocate investment, it should fully explain how it identified the plant used to provide CCS Interconnection service.

(3) United should provide total investment underlying each rate element of its CCS Interconnection service and identify the accounts established by Part 32 of the Commission's Rules, 47 C.F.R. Part 32, in which these investments are recorded.

(4) United should identify and fully document all factors applied to the investment identified to above develop the rates, cross-referencing to Automated Reporting Management Information System (ARMIS) data where possible.

IV. PROCEDURAL MATTERS

A. Filing Schedules

9. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. We require United to file a direct case addressing each issue designated above no later than **November 16, 1992.** Moreover, the direct case must supply all information upon which United relies to support its position. Pleadings responding to the direct case may be filed no later than **December 16, 1992,** and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." United may file a "Rebuttal" to oppositions or comments no later than **January 4, 1993.**

10. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, Downtown Copy Center, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

11. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the order.

B. Ex Parte Requirements

12. Ex parte contacts (*i.e.*, written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until the commencement of the Sunshine Agenda period. The Sunshine Agenda period terminates when a final order is released and the final order itself is issued. Written *ex parte* contacts and memoranda summarizing oral *ex parte* contacts must be filed on the day of the presentation with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. §§ 1.1200 *et seq.*

C. Paperwork Reduction Act

13. The investigation established in this order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the petition for waiver of Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74, filed by United Telecommunications, Inc., IS GRANTED.

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[5] United's Transmittal 300 is similar to other out-of-band signalling tariffs we have allowed to go into effect in the past. *See* BellSouth Telephone Companies, 5 FCC Rcd 7619 (Com.Car.Bur. 1990); Bell Atlantic Telephone Companies, 6 FCC Rcd 2907 (Com.Car.Bur. 1991); NYNEX Telephone Companies, 6 FCC Rcd 4283 (Com.Car.Bur. 1991); Centel Telephone Companies, 6 FCC Rcd 5144 (Com.Car.Bur. 1991); Pacific Bell, 6 FCC Rcd 6069 (Com.Car.Bur. 1991). Specifically, Southwestern Bell imposes separate non-recurring charges for Calling Party Number, Carrier Selection Parameter, and other parameters. Southwestern Bell Telephone Company, 7 FCC Rcd 3456 (Com.Car.Bur. 1992).

15. IT IS FURTHER ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications, Inc., against United Telecommunications, Inc., Tariff F.C.C. No. 5, Transmittal No. 300, IS GRANTED, to the extent indicated above.

16. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, United Telecommunications, Inc., Transmittal No. 300, IS SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

17. IT IS FURTHER ORDERED that United Telecommunications, Inc., SHALL FILE tariff revisions reflecting this suspension no later than 10 days from the release date of this order. For these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 92-705.

18. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), United Telecommunication, Inc. shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Contract Tariff F.C.C. No. 32

Contract Tariff Transmittal No. 66

ORDER

Adopted: October 9, 1992; Released: October 9, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 29, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective October 13, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 32 for AT&T Accunet Spectrum of Digital Services, Inter Office Channels, Accunet T1.5 and T45 Inter Office Channels, Dataphone Digital Service, Local Channel Services, and associated components.

2. On October 6, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 66.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 32, Contract Tariff Transmittal No. 66 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 32, Contract Tariff Transmittal No. 66, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.
Revisions to Tariff F.C.C. No. 1

Transmittal No. 284

ORDER

Adopted: October 8, 1992; Released: October 9, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 28, 1992, US West Communications, Inc. (US West) filed Transmittal No. 284, to establish a nonchargeable option it calls 64 Clear Channel Capability (64 CCC), to be available with Feature Group D trunks or Circuit Switch Trunkside Option 3 Basic Serving Arrangement, both with Signalling System 7 (SS7) out-of-band signalling. The 64 CCC Option would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a digital trunk channel. Initially, US West expects this option to be used by interexchange carriers (IXCs) to establish interLATA calls between Integrated Services Digital Network (ISDN) end users. US West Description and Justification (D&J) at 1-1 to 1-2. US West plans to impose its existing new Feature Group D service installation charge for adding 64 CCC service to an existing trunk and for providing 64 CCC service on new trunk installations. *Id.* at 1-2. US West will also impose a $25.00 nonrecurring charge for 64 CCC service. *Id.* at Workpaper 1. Transmittal 284 is scheduled to take effect on October 12, 1992.

2. On September 14, 1992, MCI Telecommunications Corp. (MCI) and American Telephone and Telegraph Co. (AT&T) filed petitions to reject or suspend and investigate Transmittal 284. AT&T and MCI maintain that US West has not provided cost support for this new service under the price cap rules in order to justify setting its 64 CCC conversion charge equal to the nonrecurring charge associated with initial installation of Feature Group D service. AT&T Petition at 2-3; MCI Petition at 3-4. AT&T argues that this charge is unreasonable because it believes 64 CCC service involves only limited software modifications rather than installation of new facilities. AT&T Petition at 3-4. AT&T also notes that NYNEX plans to offer 64 CCC conversion at half the Feature Group D installation charge, and that Bell Atlantic plans to offer 64 CCC conversion free of charge. AT&T Petition at 4; MCI Petition at 3.

3. MCI further claims that Transmittal 284 does not permit "equal access" to the ISDN D-channel. MCI Petition at 2. MCI maintains that it is unclear whether US West will adhere to American Network Standards Institute (ANSI) standards, which are developed in industry fora rather than unilaterally dictated by Bell Communications Research or US West. MCI requests that the Bureau require references to technical publications which specify ANSI standards. *Id.* at 4-5. Finally, MCI criticizes the lack of discussion regarding maintenance of the lines used to provide 64 CCC service in the technical publications which are available. *Id.* at 5.

4. US West filed its reply on September 24, 1992. US West explains that it must disconnect and reconnect trunks in order to install 64 CCC service.[1] Therefore, US West asserts that it incurs the same costs when converting an existing trunk to 64 CCC service as it does when it installs a new trunk. US West Reply at 3-4. US West further replies that the cost support for its nonrecurring charge is adequate. *Id.* at 5. US West then contends that 64 CCC service will be made available to all IXCs in the same manner, so that MCI's equal access argument is not pertinent. *Id.* Furthermore, US West responds that the technical publication references requested by MCI refer to lineside services or ISDN service to be carried over the SS7 network, and so are not relevant to 64 CCC service. *Id.* at 6-7. Finally, US West denies that performance and maintenance specifications are not set forth in any of its technical publications. *Id.* at 8.

5. The Common Carrier Bureau has reviewed US West's Transmittal 284 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by American Telephone and Telegraph Co. and MCI Telecommunications, Inc., against US West Communications, Inc., Tariff F.C.C. No. 1, Transmittal No. 284, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] On October 2, 1992, pursuant to a request of the Tariff Division staff, US West submitted a comparison of work activities associated with a new installation and with adding 64 CCC service to an existing Feature Group D trunk with SS7.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc.
Revisions to Tariff F.C.C. No. 1

Frame Relay Service

Transmittal Nos. 282 and 294

ORDER

Adopted: October 8, 1992; Released: October 9, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 13, 1992, US West Communications, Inc. (US West) filed Transmittal No. 282 to establish "Frame Relay Service." This service is designed to support high speed data transmission between different locations in a customer's local area network, wide area network, or metropolitan area network. This data service uses a new "frame relay" protocol which enables the frame relay network to transport data at a faster rate than existing packet switched services. US West Description and Justification (D&J) at 1-1, 1-5. Sprint Communications Company L.P. (Sprint) and MCI Telecommunications Corp. (MCI) filed petitions to reject or suspend and investigate US West's transmittal, and US West filed a reply.

2. Sprint alleges that US West's cost support does not comply with Section 61.38 of the Commission's rules, 47 C.F.R. § 61.38, because the development of unit investment and costs, and the overhead loading factor, have not been explained. Sprint Petition at 5-6. US West replies that the cost support in Transmittal 282 fully complies with Section 61.38 of the Commission's rules. US West Reply at 7-8.

3. Sprint and MCI also contend that US West's Frame Relay Service should not be tariffed on the interstate level, but should be tariffed only at the state level. Sprint Petition at 2-3; MCI Petition at 3 n.4.[1] US West asserts that Sprint's and MCI's argument is based on a misinterpretation of a diagram in Transmittal 282, and promised to revise its tariff to remove this source of confusion prior to its effective date. US West Reply at 6.[2]

4. MCI also claims that US West plans to make its Frame Relay Service available initially only in three serving wire centers, and to require interexchange carriers (IXCs) without points of presence at those locations to purchase special access lines to the frame-relay-equipped serving wire centers. MCI claims this is a violation of Section 202(a) of the Communications Act, 47 U.S. C § 202(a). MCI Petition at 6-7. US West responds that MCI is incorrect in claiming that Frame Relay Service will be limited to three serving wire centers. US West explains that Frame Relay service will be offered in 14 cities, and all serving wire centers in those cities will be designated Frame Relay Service Points in NECA Tariff F.C.C. No. 4. US West Reply at 10-11 and n.37.

5. Sprint and MCI next argue that US West's tariff is premature because the American Network Standards Institute (ANSI) frame relay interconnection standard, called Network-to-Network Interface (NNI), has not yet been adopted. Sprint Petition at 3-4; MCI Petition at 2-3. Sprint asserts that the interconnection specification discussed in US West's D&J is inconsistent with that in its tariff. Sprint Petition at 3-4. MCI claims that the lack of interconnection standards at this time could enable US West to discriminate in interconnection for its own customers at the expense of the customers of IXC frame relay services, in violation of Section 202(a) of the Communications Act. MCI Petition at 3-4. US West replies that MCI and Sprint will be able to interconnect with US West's frame relay network before adoption of NNI interconnection standards. US West maintains that NNI will be an enhancement of the User Network Interface standard which US West will use, and that this standard can be used in place of Network-to-Network Interface. US West Reply at 4-5. US West also maintains that the technical publications explaining its standard were made available to IXCs in June 1992. *Id.* at 9-10.

6. MCI maintains that US West limits the amount of data that will pass through a port, and has not specified how it will discard frames when the network is in a state of congestion. According to MCI, these conditions are unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C § 201(b). MCI Petition at 7-8. US West responds that this restriction is designed to limit the number of permanent virtual connections assigned to each port of US West's Frame Relay Switch. US West Reply at 11-12. US West also asserts that its method of discarding frames for errors or at times of congestion is explained in its technical publication. *Id.* at 12.

7. The Common Carrier Bureau has reviewed the US West transmittals, MCI's and Sprint's petitions, and US West's reply. We conclude that no compelling argument has been presented that the tariff is patently unlawful so as to warrant rejection, and that an investigation is not warranted at this time.

8. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by MCI Telecommunications Corp. and Sprint Communications Company L.P., against US West Communications, Inc., Tariff F.C.C. No. 1, Transmittal No. 282, ARE DENIED.

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[1] MCI and Sprint also assert that US West is prohibited from offering end-to-end interLATA frame relay services by the Modification of Final Judgment (MFJ). Sprint Petition at 3 n.1; MCI Petition at 3 n.4, *citing* United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). US West argues that Transmittal 282 does not provide interexchange service in violation of the MFJ, because the end users control the routing of frames through customer premises equipment. US West Reply at 5-6.

[2] On October 2, 1992, US West filed Application No. 100, requesting Special Permission to file these revisions. On October 6, 1992, the Chief, Tariff Division granted Application No. 100 and assigned Special Permission No. 92-719. US West made these revisions in Transmittal No. 294 on October 8, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Tariff F.C.C. No. 12 — Transmittal No. 4474

ORDER

Adopted: October 9, 1992; Released: October 9, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 28, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective October 12, 1992. This filing modifies Option 24 of AT&T's Virtual Telecommunications Network Service (VTNS) by increasing the Basic Charge and the quantities of Digital Transmission Capability (DTC) and Voice Transmission Capability (VTC) network components, adding a minimum monthly DTC/VTC charge, and revising the rates for DTC and VTC network components.

2. A petition to reject or, in the alternative, suspend and investigate Transmittal No. 4474 was filed by Tel-Save, Inc, (Tel-Save). The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4474 and Tel-Save's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.[1]

3. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 4474, filed by Tel-Save, Inc. is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] We note with concern, however, the allegations made by Tel-Save in its petition and in informal contacts with the Common Carrier Bureau that AT&T is engaging in a variety of activities designed to prevent or impede it from obtaining Tariff 12 services, and in particular Option 24. These allegations are also the subject of a formal complaint before the Commission. We intend to resolve expeditiously the issues raised by these allegations in the context of that proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc. Revisions to Tariff F.C.C. No. 1 — Transmittal No. 57

ORDER

Adopted: October 1, 1992; Released: October 2, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 21, 1992, BellSouth Telecommunications, Inc. (BellSouth) filed Transmittal No. 57 to establish a nonchargeable option it calls 64 Clear Channel Capability (64 CCC), to be available with Feature Group D (FGD) trunks with SS7 out of band signalling. The 64 CCC Option would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a digital trunk channel. Initially, BellSouth expects this option to be used by interexchange carriers (IXCs) to establish interLATA calls between Integrated Services Digital Network (ISDN) end users. BellSouth Description and Justification (D&J) at 1-2. This service will be available initially in a limited number of locations in Alabama and Georgia. *Id.* at 2-3. BellSouth does not intend to impose a nonrecurring charge (NRC) for ordering a new FGD service with 64 CCC, beyond that charged for ordering FGD without 64 CCC. *Id.* at 3. However, BellSouth will impose its NRC for service rearrangements when a customer adds 64 CCC to an existing service. *Id.* at 3-4. Transmittal 57 is scheduled to take effect on October 5, 1992.

2. On September 8, 1992, MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend and investigate Transmittal 57. MCI claims that Transmittal 57 does not clearly state whether IXCs will be able to offer services to end users over the ISDN D-channel, and maintains that a limitation on such service would place IXCs at a competitive disadvantage relative to BellSouth. MCI Petition at 2. MCI also criticizes BellSouth's references to Bell Communications Research (Bellcore) technical publications, and suggests that the Bureau require BellSouth to adhere to American Network Standards Institute (ANSI) standards, which it claims are developed in industry fora rather than unilaterally dictated by Bellcore. *Id.* at 3. In addition, MCI asserts that Bellcore's technical publication TR-TSV-000962 precludes the inclusion of the Access Transport Parameter with 64 CCC service, which provides additional signalling information. *Id.* at 3. Finally, MCI criticizes the lack of discussion in BellSouth's technical publications regarding maintenance of the lines used to provide 64 CCC service. *Id.* at 4.

3. BellSouth replied on September 18, 1992. BellSouth maintains that the D-channel capability requested by MCI is a lineside service, and therefore unrelated to 64 CCC, a trunkside service. BellSouth Reply at 4. Similarly, BellSouth asserts that the ANSI standards cited by MCI are lineside standards not related to 64 CCC service. *Id.* at 4-5. Finally, BellSouth asserts that it will provide the Access Transport Parameter. *Id.* at 5 n.7.

4. The Common Carrier Bureau has reviewed BellSouth's Transmittal 57 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications, Inc., against BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, Transmittal No. 57, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-633

In re Applications of

CENTRAL FLORIDA COMMUNICATIONS GROUP, INC.	File No. BPH-880505MS
HOLLY HILL RADIO PARTNERS	File No. BPH-880505NQ
WALO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-880505OZ
MICHELLE N. TERZYNSKI	File No. BPH-880505PL

For Construction Permit
for a New FM Station
on Channel 277A in Holly Hill, Florida

Appearances

Kathryn S. Schmeltzer, Esq. and *John K. Hane, Esq.* on behalf of Central Florida Communications Group, Inc.; *Michael J. Wilhelm, Esq.* on behalf of Holly Hill Radio Partners; *James J. Freeman, Esq.* and *Stephen J. Cochilla, Esq.*, on behalf of WALO Broadcasting Limited Partnership; *Michael R. Miller, Esq.* on behalf of Michelle N. Terzynski; and *Charles Dziedzic, Esq.* and *James W. Shook, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: October 9, 1992; Released: October 26, 1992

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of four applicants:[1] Central Florida Communications Group, Inc. ("CFCG"), Holly Hill Radio Partners ("HHRP"), WALO Broadcasting Limited Partnership ("WALO") and Michelle N. Terzynski ("Terzynski").

2. The *Hearing Designation Order* ("*HDO*") DA 90-1920 released January 30, 1991, reported at 6 F.C.C. Rcd 522 (MM Bur. 1991) and published at 55 Fed. Reg. 28098 (released July 9, 1990) sets the standard comparative issues for adjudication as follows:

(a) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

The party applicants have the burdens of proving their proposals by a preponderance of the evidence. *Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). *Knoxville Broadcasting Corp.*, 103 F.C.C. 2d 669, 687 (Review Bd 1986). *See also Steadman* v. *SEC*, 450 U.S. 91 (1981).

3. In the course of this proceeding, the following issues were added by the Presiding Judge against CFCG:

(c) To determine whether CFCG was financially qualified to be a Commission licensee when it filed its Form 301 application.

(d) To determine whether CFCG is presently financially qualified to be a Commission licensee.

(e) To determine whether CFCG violated Section 1.65 by failing to report the loan of $80,000 in January 1989, the obtaining of a bank letter in July 1989, and the bank merger and whether that merger adversely affected the bank letter of July 1989.

(f) To determine whether evidence adduced under Issues A, B and C above, establishes that CFCG misrepresented or was lacking in candor in the prosecution of its application.

Memorandum Opinion and Order, FCC 91M-2567, released August 19, 1991.

4. A prehearing conference was held on April 11, 1991, and hearing sessions were held on September 24-27, 1991. A post hearing conference was held on November 19, 1991, in order to determine the status of financing for the dismissed applicant.[2] By *Order* FCC 91M-3397, released December 5, 1991, the Presiding Judge closed the record. The parties were directed to file Proposed Findings of Fact and Conclusions of Law ("PFC") on January 10, 1992, and to file Reply Proposed Findings of Fact and Conclusions of Law ("RPFC") on January 27, 1992. *Id.*

5. The parties offered into evidence a joint engineering exhibit that was received into evidence on September 24, 1991. (Tr. 82-83.) The Bureau filed its PFC with respect to comparative coverage on January 10, 1992. The parties have stipulated that as to each party's coverage there are no significant differences in the areas or populations to be served by the four applicants. (Jt. Engineering Exh. and Stipulation No. 1.)

FINDINGS OF FACT

6. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325

[1] There were thirteen applicants in the designation order. There were five applicants that filed notices of appearance and paid the hearing fees. The Presiding Judge dismissed former party applicant H.B. Broadcasting, Inc. for its admitted lack of financial qualifications. *See Memorandum Opinion and Order*, FCC 91M-3385, released December 5, 1991. That ruling was not appealed.

[2] *See* fn. 1, *supra*.

U.S. 327, 333 (1945); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Standard Comparative Issue

7. The matters for determination under the standard comparative issue are which of the integration proposals would, on a comparative basis, best serve the public interest [*HDO* at Para. 14(7)]; and, in light of the evidence adduced relating to that issue, which of the applications should be granted [*HDO* at Para. 14(8)].[3] *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Media Diversification

8. Only WALO asserts that CFCG should receive a diversification demerit. (WALO PFC at 19, 43.) WALO acknowledges that there are no questions of diversification for itself or HHRP or Terzynski. (*Id.*)

9. The evidence shows that Charles W. Cherry, Sr. ("Cherry, Sr.") and his wife, Julia T. Cherry ("Julia Cherry"), who are principals of CFCG, have ownership interests of 10% and 15% respectively in *The Daytona Times*, a newspaper. *The Daytona Times* is circulated in the Holly Hill community. (*Id.*) Should CFCG receive the grant, the Cherrys will assign their interests in the newspaper to their children. (CFCG Exh. 1A, CFCG PFC at 16.) Cherry, Sr. also will terminate his services with and resign as general manager of Station WPUL-AM, South Daytona, Florida. (*Id.*) The controlling stock of station WPUL-AM is owned by the two sons of Cherry, Sr.

10. The children who will receive the assigned interests from their parents are non-voting shareholders of CFCG who now own 75% of the newspaper: Charles W. Cherry, II ("Cherry II") is president and a director of the *Times* as well as a 25% shareholder; Cassandra K. Jenkins ("Jenkins") is a director and a 25% shareholder; Glenn W. Cherry ("Glenn Cherry") is a director and a 25% shareholder. Each of these three children also hold 12.50% apiece in the applicant CFCG. (CFCG Exh. 1 and Exh. A.) In view of the commitment of the Cherrys to assign their interests in the newspaper, there are not sufficient indicia of common control to attribute to CFCG all of the interests in *The Daytona Times* that are held by Cherry Sr. and Julia Cherry and their children.

11. It is found that CFCG does not have a controlling interest in *The Daytona Times* which is a means of mass media. It is further found that HHRP, WALO and Terzynski have no attributable interests in a means of mass communications.

Comparative Coverage

12. A stipulation was received in the record that is based on empirical data and which constitutes substantial evidence. (Jt. Engineering Exh. and Stip. 1.) The total areas and populations within each applicant's proposed 1 mV/m contour are set forth in the stipulation as follows:

Applicant	Area (Sq. Kms.)	Population
CFCG	1,139	155,575
HHRP	1,146	156,371
WALO	1,123	155,540
Terzynski	1,360	159,267

The widest difference between applicants is 3,800 persons or 2.4% There is no significant coverage difference found in the areas and populations proposed to be covered and therefore no party applicant receives a diversification credit or demerit. *Id.*

Best Practicable Service

Central Florida Communications Group, Inc.

13. CFCG is a Florida corporation which was structured two-tier with voting and non-voting stock. The ownership and voting interests are reflected in the following chart:

Shareholders (Stock Subscribers)	Position	Voting Percentage	Equity
Charles W. Cherry, Sr.	V.P., Sec., Treas., Dir.	40%	20%
Julia T. Cherry	President, Director	60%	30%
Glenn W. Cherry	None	-0-	12.50%
Charles W. Cherry, II	None	-0-	12.50%
Stanley Monts	None	-0-	12.50%
Cassandra K. Jenkins	None	-0-	12.50%

(CFCG Exh. 1.)

14. The equity ownership is split 50/50 between Cherry Sr. and his wife and the Cherry children and Stanley Monts ("Monts"), a cousin. The two sons, Glenn Cherry and Cherry II, in effect had borrowed CFCG funds to purchase their equity shares. (Cherry, Sr., Tr. 313-14.) These two brothers also own 26% each (52% together) of the voting stock of PSI Communications, Inc. ("PSI"), the licensee of Station WPUL-AM, South Daytona, Florida.

15. Cherry, Sr., the father of the two brothers, is employed by PSI as general manager of Station WPUL. (CFCG Exh. 1, A; HHRP Exh. 15.) On January 24, 1989, Cherry, Sr. loaned his sons $80,000 towards the purchase of PSI/WPUL-AM. He now holds PSI's note in that amount, which at the time of the hearing was in default. (HHRP Exh. 9; Cherry, Sr., Tr. 291-92.) The funds for the loan were taken from the personal bank account of Cherry, Sr. and his wife Julia. (J. Cherry, Tr. 190; Cherry, Sr., Tr. 291.) Also, after CFCG's application was filed in this case, on August 30, 1988, CFCG loaned $15,000 to PSI to be used for "working capital for the operations of WPUL-

[3] *HDO* issues 1 through 6 [Paras. 14(1) through 14(6)] related to dismissed applicants and those issues are no longer relevant to this proceeding.

AM." (HHRP Exh. 10; Cherry Sr., Tr. 283-84.) Most of the monies pursuant to the $15,000 note were paid by CFCG checks that were made payable to PSI. (HHRP Exh. 6 reflects checks totalling $10,400; Cherry, Sr., Tr. 294-95.) Cherry, Sr. testified that the loans were actually made to his son Cherry II and not to PSI. (Cherry, Sr., Tr. 276, 283.) But Cherry II signed the notes in his capacity of PSI's president. Both notes are in default. (Cherry, Sr., Tr. 292.) Monies from Charles Cherry Associates, Cherry, Sr.'s consulting business, were used to cover some of CFCG start-up expenses. (Cherry, Sr., Tr. 313.) Cherry II is found to have benefitted his sons and PSI in connection with these payments as loans or as gifts from father to sons. There is no evidence that Cherry, Sr. received or was promised an equity interest in PSI or that he exercised control over PSI.[4]

CFCG's Proposed Integration

16. Cherry, Sr., an experienced broadcaster, proposes to be the full-time general manager of CFCG's station. (CFCG Exh. 3.) He is to supervise all day-to-day operations and he will directly supervise all management level employees. Cherry, Sr. will be responsible for hiring and firing decisions and he will implement the station's Equal Employment Opportunity policies which will be established by Ms. Cherry. (*Id.*)

17. Cherry, Sr. has committed to resign from any employment he may have at the date of program test authority. He will then terminate his management of any current business, which would include his job at Station WPUL-AM, in order to assume his duties as general manager of the Holly Hill station. (CFCG Exh. 3.)

18. Mrs. Cherry is president and a director of CFCG. (CFCG Exh. 2.) She is a retired school teacher. (J. Cherry, Tr. 225.) She proposes to serve as full-time Director of Public Affairs for CFCG. (CFCG Exh. 2.) The duties of the position include supervision of the production of the station's public affairs programming and responsibility for the station's community outreach program. (*Id.*) In furtherance of ascertaining needs, Mrs. Cherry will meet with community leaders and organizations on a regular basis and she will develop programming responsive to those needs and interests. (*Id.*) Should CFCG be awarded the grant, Mrs. Cherry will resign from any current business endeavor or employment. (*Id.*)

Local Residence

19. Mr. and Mrs. Cherry have resided at 623 Orange Avenue, Daytona Beach, Florida from 1958 to the present. (CFCG Exh. 2 at 1-2.) Daytona Beach is within the proposed station's 3.16 mV/m contour. It is further found that they have resided within that contour, which includes the service area, since 1953 or approximately 39 years. (*Id. See also WALO's* PFC at 16.)

Local Civic Activities - Julia T. Cherry

20. Mrs. Cherry has listed numerous organizations for which she seeks credit for civic activity. CFCG does not cite to testimony to explain the nature and scope of the activities. The Presiding Judge will credit only those civic associations that facially appear to be operating within the service area.[5] These include:

(a) Volunteer [with local] PTA from 1960-85.

(b) Advisor to NAACP Youth Council, 1975-77.

(c) Member, Pacesetters Club, 1976 to present.[6]

(d) Volunteer for the Little League Football and Cheerleaders for YMCA (1968-70).

(e) Chairperson, Delta Sigma Theta Social Action Committee (1987-91) (worked on community census education project and assembled packets for local county schools, grades K-12).

(f) Contact Person for 1990 Census (contacted retired teachers to work on census and organized workshops and discussions at Bethune-Cookman College and state census supervisors).

(g) Volunteer for "Hope House", a Daytona Beach project that involved teaching basic sewing to young ladies and assisting substance-abuse mothers and their infants.

(h) Member, Daytona Beach Library Board (1991).

(i) Member, Executive Committee, Volusia County Beach, NAACP (1989 to Present).

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[4] Adverse findings are sought with respect to miscellaneous payments by CFCG to Peart & Associates, a construction company in which Cherry, Sr. is a stockholder, and to Exact Construction Company in a matter unrelated to the CFCG application. Monies from Charles Cherry Associates, Cherry, Sr.'s consulting business, were used to cover CFCG expenses. (Cherry, Sr., Tr. 294-95, 297, 299, 313.) There is no decisional significance shown with respect to such evidence. (*See* WALO PFC at 44.)

[5] Excluded are: Memberships (1960) in the NEA and in Future Teachers of America because of the passage of time and the failure to relate her activities in connection with those memberships to the local community. Membership in the Stewart Memorial United Church from 1954 to the present because her membership does not imply activity which would enhance her knowledge of the community. The teaching of Bible studies and the heading of unspecified youth programs fails to account for the years of those activities and lacks specificity as to program identification. Similarly, life membership in the NAACP, a national organization, does not establish an inference of related local activity. The same result is reached with respect to her membership since 1956 in the National Council of Negro Women, a 1982 membership in the National Sorority of Phi Delta, Inc., and a life membership in the Delta Sigma Theta Sorority, Inc.

[6] Pacesetters is described in written testimony as being a social club organized for the purposes of distributing food and money to needy families in the community, educational scholarship funds for needy children, and local contributions to the United Negro College Fund. Volunteer and Deputy Registrar, organization of sorority members and community persons and poll worker during election years fail to specify a relevant time period. There are no descriptions of work done as a census volunteer in 1990 or as Chaplain of the Delta Sigma Social Action Committee in 1987-91.

(CFCG Exh. 2 at 2-3.)

Local Civic Activities - Charles W. Cherry, Sr.

21. Mr. Cherry also has listed numerous organizations for which he seeks civic activity credit. His testimony in the area of civic activity also lacks supporting testimony to explain dates and relevant local activities with respect to some of the organizations. CFCG will only be credited with civic activities that appear to be relevant.[7] These include:

(a) President, Volusia County Branch NAACP (1971-80).

(b) Scoutmaster, Boy Scouts of America, Troop #109, Stewart United Methodist Church. (Assisted in organizing the troop, increased participation to more than 100 boys in the community, and organized a Cub Scout Program during the same period, 1953-1961.)

(c) Member, Citizens' Welfare League. (This was an organization formed by Dr. Mary McCloud-Bethune whose primary mission was to address social and political problems of the citizens of the Volusia County area, 1953-1956.)

(d) Basileus and Keeper of Records and Seals, Omicron Chapter, Omega Psi Phi Fraternity, 1953 - present (served as undergraduate advisor to Bethune-Cookman Student Chapter for many years during the period 1953-1991).

(e) Member, Mayor's Interracial Committee, 1954 - 1964.

(f) Advisor, BETA Group (students who organized at Mainland High School to monitor treatment of Blacks during the process of desegration of public schools in Volusia County, 1964-1968).

(g) Founder and President, People's Committee for Better Business (Cherry, Sr. organized a community coalition to address county problems, the Citizens Coordinating Committee, 1969-1971).

(h) Founder and First Chairman of the Board, Richard V. Moore Community Center (a multi-purpose center addressing the problems of crime, drugs, teenage pregnancy and other ills of the citizens of the Volusia County area, 1975-1991).

(i) Member and Founder, John G. Riley Home (an historical home in Tallahassee, Fl. added to the list of tourist attractions depicting the life of one of Florida's most popular Black educators).

(j) Candidate for City Commissioner of the City of Daytona Beach (1960 and 1971).

(k) Candidate for the Florida House of Representatives from Daytona Beach (1984).

(l) Organized and unionized the Hotel Maids and Garbage Workers of the City of Daytona Beach (to provide better working conditions, 1968 - 1972).

(m) Assisted coaches and concerned parents in the athletic programs of St. Paul and Seabreeze High School (providing transportation and supervision to team members, 1978).

(n) President, Sunset Park Cemetery Association (a non-profit organization established to meet the needs of moderate and low-income persons in the Volusia County area, 1968-1991).

(o) Founder and First President (1985-86) (Daytona Beach-Volusia County Chamber of Commerce).

(CFCG Exh. 3 at 2-4.)

Prior Broadcast Experience

22. Since February 1989 and continuing through the present, Mr. Cherry has been employed as the general manager of radio station WPUL-AM, South Daytona, Florida. (CFCG Ex. 3, p. 2.)

Minority Ownership

23. Mr. and Mrs. Cherry are African-American. (CFCG Exhs.2,3.)

Auxiliary Power Proposal

24. CFCG will acquire, install and operate an auxiliary power source for the emergency operation of the station. (CFCG Ex. 4.)

Financial Disqualification Issue

25. CFCG contends that Mr. and Mrs. Cherry had decided to self-finance before their application was filed. Mrs. Cherry testified at the hearing that they would not seek to borrow funds for construction and operation. (J. Cherry, Tr. 199.) However, they once attempted to obtain a loan at a subsequently merged financial institution, the former Florida National Bank ("FNB"). (*Id.*)

26. Mrs. Cherry presented the applicant's case-in-chief on the financial issue on which CFCG was assigned the burden of proof and the burden of proceeding.[8] (CFCG Exh. 5, Tabs 1 through 15.) She testified in her written

[7] For reasons given with respect to Mrs. Cherry's civic activities in footnote 5, Mr. Cherry receives no credit for: membership on the National Board of Directors, NAACP (1976-80); State President, Florida Conference, NAACP Branches (1974-84); Advisor, NAACP Youth Chapter (1960-63); Member, Stewart Memorial United Methodist Church (1953-present) [although Cherry, Sr. cites membership on "church-related committees" there is no specificity of committees or their works and therefore no nexus is shown with a gain of community knowledge]; President, Westside Business and Professional Association (1961-66); Member, Westside Business and Professional Association (1953-present); Member, Social Engineers, 1953-58; Member Statewide Steering Committee on Health; Member, Small and Minority Business Study Commission; Member, Florida Advisory Board on Education of Blacks in Florida (1989-91); Political campaign, local and statewide, without specification of dates; Campaign Staff, Presidential Campaign of Senator George McGovern (1971); Memberships on Daytona Beach Board of Realtors; Founder and Charter Member, Daytona OIC; Member, State Advisory Committee for Education of Blacks in Florida (1987 to present); Member, Small & Minority Business Investment Committee State of Florida (no date specified); and President, Southeast Black Publishers' Association (1986 to present).

[8] *See Memorandum Opinion and Order*, FCC 91M-2567, *supra* at 4.

exhibit that her former FCC attorney, Mr. James L. Winston ("Winston"), or another attorney in Winston's office, Mr. Erie F. Simpson ("Simpson"), had advised her of the need for CFCG to demonstrate its financial ability. (CFCG Exh. 5.) CFCG has not offered the testimony of Winston or Simpson and has elected to rely solely on Mrs. Cherry's account and related documents.

27. CFCG's application containing its financial certification was filed on May 5, 1988. Before she certified, Mrs. Cherry received from Winston/Simpson a "draft budget" that estimated the required construction and operation costs at $316,300 and the prosecuting costs at $61,800 for total costs of $378,100. (CFCG Exh. 5.) In her written testimony, Mrs. Cherry avers that the prosecuting costs are expenses that are paid on an ongoing basis, and that therefore the true costs amount to $316,300. (*Id.*) There are no objections made to the accuracy of the estimate by any of the competing parties. The questions raised are directed to the reasonableness of the assurance that sufficient liquid personal funds to cover $378,100 in costs were on hand when Mrs. Cherry certified.

28. Specifically, Mrs. Cherry testified in writing[9] as follows:

> I was aware that my husband, Charles Cherry, and I had net liquid assets and/or assets convertible to net liquid assets sufficient to cover the costs of constructing and operating the proposed station for three months. My husband prepared a net worth statement which demonstrated this to be the case. It showed that we had a net worth as of April 1, 1988, of $800,000.

(CFCG Exh. 5 at 1.) It was based on the net worth statement prepared by her husband that she signed CFCG's financial certification. (CFCG Exh. 5 at 2.) That financial statement reflects as liquid assets cash in the amount of $101,000 and insurance cash values in the amount of $80,500 for a total of only $181,500. It cannot be determined from the financial statement whether the accounts receivable of $5,000 are current or collectible in the short term. Assets in the form of stocks, bonds and securities in the amount of $105,000 cannot be determined to be listed securities or otherwise to be readily marketable investments. Real estate valued at $386,000 was not shown to be a liquid asset. Nor were "other assets" valued at $182,000 shown to be liquid assets. Therefore, it is found that when she certified, Mrs. Cherry had reasonable assurance of only $181,500 in liquid assets. Thus, there was at that time a shortfall in liquid assets of $134,800.

29. There is a document that accompanied the financial statement entitled "Index to Documents Supporting April 1, 1988 Financial Statement." The Index was submitted as part of Mrs. Cherry's sworn testimony. The record does not reflect the date that the Index was prepared. Since CFCG has the burden of proceeding, its failure to offer evidence on the date of its creation results in the presumption that it did not exist when Mrs. Cherry certified and that it was prepared for her testimony at the hearing.

30. There are various infirmities and inconsistencies between the index and the financial statement which impact adversely on its reliability. As indicated above, the financial statement of April 1988 reflects a cash value of insurance at $80,500. However, Tabs 16 through 19 of CFCG's Exh. 5 confirms a total cash surrender value of only $44,035. CFCG subsequently retained an accounting firm to prepare a statement of financial condition which was completed on August 19, 1991. (*See* CFCG Exh. 5 at Tab 47.) The accountants calculated insurance cash surrender values at $55,535 which is yet another variance. The accountants also included the following disclaimer:

> Charles W. and Julia Cherry have elected to omit substantially all of the disclosures required by generally accepted accounting principles.

(*Id.*) Therefore, the financial statement prepared by Cherry, Sr. that was relied on by Mrs. Cherry when she certified to CFCG's financial qualification is found to be unreliable in those material respects.

31. There are additional material inconsistencies. (*See also e.g.* Terzynski PFC at 5-7.) In one instance, it is noted that a bank account statement of Charles W. Cherry and Associates dated February 29, 1988 is relied on to show a supporting asset of $12,347 as of April 1, 1988. But the statement reflects an opening balance of $316.12 and a wire transfer into the account on February 29, 1988, in the amount of $12,056.06. This appears to be a trade or business account which may be subject to rapid deposits and withdrawals. The statement closest to the April 1, 1988, financial statement is not included. For those reasons the claim of $12,347 in liquid assets as of April 1, 1988 is rejected as unreliable based on the evidence submitted and relied upon by CFCG.

Availability Of Liquid Assets

32. Notwithstanding Mrs. Cherry's testimony that CFCG would rely on only the personal assets of Mr. and Mrs. Cherry to construct and operate (Para. 25, *supra*), there was an attempt to obtain a bank loan commitment letter after the application was filed. In the first half of 1989, Mr. and Mrs. Cherry loaned their son Charles the sum of $80,000 in order to assist him in his purchase of Station WPUL-AM. While the applicant contends that the loan did not change their financing plans for the station,[10] in 1988 or 1989, the Cherrys decided to seek a bank letter when their new FCC counsel advised them that a bank letter is an acceptable method to demonstrate reasonable assurance to the FCC. (CFCG Exh. 5 at 4; J. Cherry, Tr. 244-45.) Mrs. Cherry testified that the bank letter was a "second means" of demonstrating financial qualification. (*Id.*)

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[9] On redirect, Mrs. Cherry testified in response to counsel's questions that counsel had "authored" Exh. 5 with the assistance of Mr. and Mrs. Cherry. (J. Cherry, Tr. 249.) That admission casts some doubt on whether the typewritten narrative represents Mrs. Cherry's recollection of events. However, by being subject to cross-examination there is no adverse inference attributed to her admission of counsel's authorship.

[10] There was no disclosure amendment filed under Section 1.65. *See* CFCG Exh. 5 at 2-3 (Mrs. Cherry's written testimony wherein she averred that there was no necessity to report the loan pursuant to Section 1.65). When confronted with the statement on cross-examination, Mrs. Cherry replied: "I don't know what that [Section] 1.65 is." (J. Cherry, Tr. 217.)

33. On July 28, 1989, the former Florida National Bank ("FNB") issued a letter to Mrs. Julia T. Cherry, without mention of the CFCG entity. (CFCG Exh. 5 at Tab 46.) Mr. Cherry was the person who visited the bank and negotiated the letter. (CFCG Exh. 5 at 4.) The letter erroneously states that Mrs. Cherry's group "will apply" for a construction permit when in fact on that date the CFCG's application had been filed at the FCC. In its letter, the FNB stated a willingness to loan Mrs. Cherry $400,000 at 2 points above prime, subject to the receipt of an award of a permit from the FCC. Mrs. Cherry admits in her testimony that FNB was subsequently merged into the First Union Bank. (CFCG Exh. 5 at 4.) She stated that no one from First Union has denied that it would honor the FNB letter. But there was no affirmative evidence that First Union would honor the commitment of FNB.

34. CFCG has submitted an updated financial statement for Mr. and Mrs. Cherry dated as of June 30, 1991. (CFCG Exh. 5 at Tab 48.) The accountants who prepared the statement state the same disclaimer that the Cherrys elected to omit significant disclosures. (*See* Para. 36, *infra.*) The cash surrender values of life insurance policies were increased to $82,624 in 1991 from $55,535 in 1988, without any accounting shown for the difference. And there are no appraisals introduced for real estate stated to have a value of $230,730.[11] A real estate investment relied upon through Mr. Cherry's minority interest in Mormen Realty is disallowed because there is no evidence that he has the authority to liquidate the property or that his interest would be purchased by other principals of Mormen. CFCG asserts that Mormen Realty's investments should be credited because Mormen is controlled by the Cherry's son, Charles II. It appears that Charles II owns a two thirds interest in Mormen. (*See* CFCG's RPFC at 6 and CFCG Exh. 5, attachment 2 at page 2 n.6.) The argument of CFCG in its Reply is almost a tacit admission that Cherry, Sr. would control Mormen through his control of Cherry II or that Cherry II has an active interest in the application. But there is no direct evidence to support a finding of control. Therefore, in the absence of documents to show Mormen's willingness to liquidate its holdings in order to accommodate the financial qualifications of CFCG, there is no credit allowed for the Mormen real estate investments because Charles Sr. holds only a 1/3 interest in the venture. CFCG has the burdens of proceeding and proof and an inference of family control or cooperation to assist Cherry Sr. will not be implied when direct proof of the point could have been obtained and offered.

35. Similarly, the Cherrys appear to rely upon the Winchester property in Daytona Beach according to a document submitted by the Cherrys. (CFCG Exh. 5 at Tab 36.) A Prudential policy shows that their daughter Cassandra is the insured and that the Cherrys appear on the document as mortgagees. Also it is difficult to trace this property to an asset value claimed by the Cherrys for financial qualification. For the financial statement of April 1988, the two properties listed on the index are the Cherry's primary residence on Orange Avenue in Daytona, Beach and the Larchwood property in Atlanta, Georgia. (CFCG Exh. at Tab 2, p. 2.) The Winchester property will not be counted.

36. To summarize,[12] CFCG seeks favorable findings of reasonable assurance for its certification based on a financial statement dated April 1, 1988 (Tab 2), a letter dated July 28, 1989, from a bank that has since merged (Tab 46), and a current reasonable assurance based on a financial statement dated June 30, 1991 (Tab 3). The two financial statements were examined by an accounting firm which issued the same qualified certificate for both financial statements (Tab 47 and 48). The accountants state the limited purpose of the financial statements "to present the assets of Charles W. and Julia Cherry at estimated current values and their liabilities at estimated current amounts." The accountants do not conclude that those intended results were achieved. There was no audit and therefore the accountants do not and could not express an opinion "or any other form of assurance." The accountants finally note that the Cherrys have elected to omit "substantially all of the disclosures required by generally accepted accounting principles" and that if those matters were included "they might influence the user's conclusions about the financial condition of Charles W. and Julia Cherry." Based on those limitations and representations from accountants with expertise on such matters, the reliability of the Cherrys' financial statements is rejected. The bank letter will not be afforded any weight because there is no evidence that it was adopted by the merged entity. Since the letter speaks to the future it could only be acted upon by the new merged institution and therefore there is no credit for a reasonable assurance from a bank letter.

37. The estimated total costs of $378,100 are not seriously contested. (CFCG Exh. 5 at Tab 1.) There were estimated prosecutorial costs in the amount of $61,800, which costs were substantially paid by date of the hearing. But those costs must be included in the analysis of Mrs. Cherry's reasonable assurance at the time of CFCG's certification on May 5, 1988. Therefore, at that time CFCG had reasonable assurance of cash in the amount of no more than $89,000. There is an absence of reliable substantial evidence to find a reasonable assurance for the Cherry's accounts receivable ($5,000), cash values of insurance ($80,500), stocks, bonds and securities ($105,000), real estate ($386,000) and other assets ($182,000). The financial statement of June 30, 1991, is an improvement but it will not be credited with reasonable assurances for more than $120,140 cash on hand. The estimated prosecutorial costs of $61,800 can be deducted but an undetermined sum for additional legal fees would need to be added. There is insufficient data in the record to make an accurate offset to CFCG's original cost estimate. It is concluded as a finding of fact that the applicant has had reasonable assurance of liquid assets ranging from $89,000 to $120,140 which

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[11] Tax assessments that were submitted would show the assessed value of the Winchester Avenue property to be only $40,800. (CFCG Exh. 5 at Tab 36.) Valuation of the Orange Avenue property is an insurance policy and the value of the Larchwood property is based on an offer made in 1991 to purchase the property for $82,500 contingent on the purchaser obtaining a loan for $81,872.

[12] The record made by CFCG on the financial issue is difficult to follow and analyze because it is not set forth with clear references to sources. CFCG Exh. 5 consists of a four page textual declaration of Mr. and Mrs. Cherry and 48 tabbed documents which are not tied into the declaration narrative. The proposed findings and reply briefs in general assert conclusions with little reference to transcript testimony and tabbed documentation.

amounts are substantially below CFCG's estimated costs of $378,100 needed for construction and operation for three months.

Bona Fides Of CFCG's Integration Proposal

38. There are substantial questions raised by the evidence at hearing on the *bona fides* of an integration plan which proposes that Mrs. Cherry will be the leading principal and that her son, Charles II, will remain a passive investor.

39. Mrs. Cherry is a retired school teacher. She is not employed and spends about fifteen hours per week distributing papers for *The Daytona Times*. (J. Cherry, Tr. 225.) Mrs. Cherry testified that it was her former attorney, Mr. Winston, who had determined the voting percentages and equity interests. (J. Cherry, Tr. 172.) She had no recollection of signing stock certificates (Tr. 234) and she was not sure whether or not she held a stock certificate. (J. Cherry, Tr. 232.) Her husband knew that no stock certificates were signed or issued. (Cherry, Sr., Tr. 381.) But there were stock subscriptions. (CFCG Exh. 1 at 1, RPFC at 15.) When shown an amendment to the articles of incorporation dated May 3, 1988, Mrs. Cherry testified that she did not know who had prepared the document. (J. Cherry, Tr. 185; HHRP Exh. 7.)

40. Mrs. Cherry is the president of CFCG and owns the numerical control of its voting stock. But Mrs. Cherry has never before worked at a broadcast station. She first learned of the Holly Hill allocation from her husband. (J. Cherry, Tr. 194, 225.) Her husband selected Mr. Winston as the venture's attorney whom she met for the first time at her deposition. (J. Cherry, Tr. 195.) Nor had she ever spoken with the engineer. (J. Cherry, Tr. 259.) She admitted that her son, Charles II, is an attorney and that he prepared one paper but she could not recall the paper. (J. Cherry, Tr. 196.) The documentation with respect to the accountant's examination of the Cherrys' financial statement was arranged for and gathered by her husband. (J. Cherry, Tr. 221-22.) Cherry Sr. apparently has control over the corporate check book. (Cherry, Sr., Tr. 286.

41. Mormen Realty, Inc., a family investment venture in real estate, is owned by Charles Sr. (1/3) and Charles II (2/3). (CFCG Exh. 5 at Tab 2, p. 2 n.6.) When Mrs. Cherry purchased her stock in CFCG, she made her checks payable to Mormen Realty. (Charles Sr., Tr. 292-94, 347-51.) The two sons, Glenn and Charles II, paid for their equity shares in CFCG but shortly thereafter they borrowed back those monies. (Charles Sr., Tr. 313-14.) Each paid in and reborrowed $1,750.00. (*Id.*)

42. Charles II prepared the original of CFCG's Articles of Incorporation dated November 18, 1987. (HHRP Exh. 11; Charles II, Tr. 89.) Charles II designated himself as sole director of the initial board of directors and identified himself as the incorporator. (HHRP Exh. 11). There was an Article of Amendment dated May 3, 1988, which reflects that Charles Sr. is the "sole director." (HHRP Exh. 7.) Mrs. Cherry signed above Mr. Cherry's name as president of CFCG. (*Id.*) The purpose of the amendment was to create the two classes of stock (voting and non-voting) and to provide, *inter alia*, that holders of non-voting shares would not participate in the management of the corporation, or be materially involved in the media business of the corporation. (*Id.*) It is not established who had prepared the amendment. Mrs. Cherry, CFCG's president, testified that she did not know who had prepared the amendment. (J. Cherry, Tr. 185.) Other than incorporate CFCG, Cherry II testified that he has performed no other corporate legal work for the applicant. (Charles II, Tr. 136.)

43. There is other evidence to consider with respect to Charles II. At the time that Winston withdrew as counsel, a Notice of Withdrawal was filed that listed Charles II as the person who should receive all correspondence. (HHRP Exh. 12; Tr. 341-42.) That document was offered by HHRP and was received in evidence on September 25, 1991, the day after Charles II had left the stand. There is no evidence to show that Charles II acted as more than a mail drop until new FCC counsel was retained. During that hiatus, counsel for HHRP called Charles II and urged him to sign a joint engineering exhibit. The signature block was prepared by counsel for HHRP for Charles II to sign as CFCG's attorney. (*See* Engineering Exh. and Stipulation 1.) Charles II testified that the document arrived at his office after Winston had withdrawn as counsel. After its delivery, counsel for HHRP faxed and/or called Charles II urging him to sign because time was of the essence. (Charles II, Tr. 134-35.) Charles II recalled that his parents were out-of-town at the time and therefore he signed the stipulation and returned it to HHRP's counsel who had taken on the responsibility to coordinate joint efforts and who also offered the document into evidence on the first hearing day. (Tr. 82-83.) There was no cross-examination or rebuttal evidence to counter the testimony of Charles II and his role is found to be that of a caretaker until new counsel noticed her appearance.

44. In its Reply pleading, CFCG submits that "CFCG's Articles and By-Laws clearly state that both voting and non-voting shareholders have a right to dividends." (CFCG RPFC at 10.) The record does not support that contention. A review of the articles of incorporation fails to disclose a provision for dividend rights. (HHRP Exh. 11.) Nor were the by-laws of CFCG introduced in the hearing record for review. The amendment speaks for itself and the author of the amendment was neither identified nor produced as a witness to clear up what CFCG refers to in its Reply as an "inadvertent error." (*Id.*) The confession of error relates to a provision in the amendment which denies dividend rights to voting shareholders:

> The holding of Voting Common shares shall not entitle the holder thereof to participate in any payment of dividends to shareholders under any circumstances whatsoever.

(HHRP Exh. 7.) A post-hearing disclosure amendment was filed under Section 1.65 on October 2, 1991. There was no opposition filed. The amendment reported and attached a by-law adopted on May 3, 1988 which provides:

> Each share of Voting Common Stock and Non-Voting Common Stock shall be accorded the same right to dividends.

The amendment corrects the "error" in the earlier amendment to the articles of incorporation. *See Order* FCC 91M-3157, released October 25, 1991. There is no showing of prevarication or motivation to mislead arising out of the error. Therefore, there will be no adverse finding against CFCG on the corrected error.

45. There are miscellaneous factors cited by CFCG's opponents in support of a proposed finding that the integration proposal is not *bona fide* or that it cannot be carried out as proposed. Although she is not an experienced broadcaster, there is no evidentiary basis to find that Mrs. Cherry is unable to fulfill the office of president and participate as the station's director of public affairs. Mrs. Cherry is a retired school teacher who works without pay for a family newspaper in mostly ministerial (but important) tasks. She has promised to leave that work to engage herself full-time at the station. There is no evidence to disprove her assertion or that the newspaper would fail without her active assistance. It is asserted that the acts of her husband in arranging for an FCC attorney, engineer and bank letter belies the assertion that his wife can fulfill these offices. That negative finding will not be made for the following reasons. It is recognized that family members engaged in a common enterprise will openly use their respective experience and ability in furtherance of the venture. Mr. Cherry is an experienced station manager as well as a small businessperson. As a voting shareholder, officer and director he has used his skills on behalf of CFCG. He works as general manager for his son's AM station which he has promised to leave if CFCG wins the permit. There is no substantial evidence in the record that negates Mr. Cherry's assertions. There will be no adverse findings made based on inference and speculation.

Holly Hill Radio Partners

46. HHRP is a Florida general partnership. There are two general partners: Joel Hunter ("Hunter") who owns 90% of the equity and Cindy Deans who owns 10% of the equity. Hunter is providing, or arranging for, all of the funding and he has assigned himself a 90% interest. Deans was assigned a 10% interest by Hunter in return for work. The 90/10 split was not negotiated. (HHRP Exh. 1; Tr. 437.)

47. The Partnership Agreement, dated April 1, 1988, provides in part:

> 6.0 *Decision - Making.* The business of the partnership shall proceed, generally, by consensus of the partners, and no formal voting procedure shall be required for an act of the partnership to be valid.

(HHRP Exh. 1 at 3.) Disputes are to be resolved under Florida state law and both partners consent to the jurisdiction of the Circuit Court of Volusia County, Florida. (*Id.*) By the terms of the Agreement, the partners intend to conduct the partnership business in a way which will achieve the maximum credit under the Commission's criteria. (*Id.*) It is recognized by the Presiding Judge that from the date of HHRP's application to the date of the filing of proposed findings, the Commission's comparative criteria awarded a preference to female applicants. Hunter believes that the partnership can be terminated at will. (Hunter, Tr. 432.) Deans asserts that there is no specified term for the partnership's life. (Deans, Tr. 477-78.) It is concluded that the partners intended to conduct partnership business in an informal manner. Deans testified that she would defer to Hunter if there was no agreement on a partnership matter. (Deans, Tr. 479-80.) Deans testified further that "because of the 90/100 split - - - he [Hunter] would have the majority in a decision to be made because of his higher percentage." (Deans, Tr. 479.) From these facts, it cannot be concluded that Deans was intended to participate as a *bona fide* general partner, or that Deans would share control with Hunter.

48. There is additional evidence to support the finding that HHRP is not a *bona fide* general partnership. Hunter has assumed the major portion of the responsibility for the prosecution of HHRP's application. He retained counsel and an engineer and he arranged for the financing for prosecution costs as well as the costs of construction and initial operations. (Hunter, Tr. 458-61.) Hunter has paid some bills from his own non-partnership bank account of his unrelated blood laboratory business and those monies have not been repaid by HHRP. (Hunter, Tr. 461-67.)

HHRP's Proposed Integration

49. Hunter proposes to be the full-time general manager. He will supervise all of the station's staff. Department heads will report to Hunter and Hunter will make all of the major financial decisions. He also will have final authority over programming. (HHRP Exh. 4 at 1.)

50. Hunter contends that he is in the process of divesting his 100% ownership in Atlantic Plasma Corporation ("APC"), d/b/a Hunter Laboratories, a commercial blood bank with offices located in Daytona Beach. (Hunter, Tr. 443.) Hunter has owned the business since 1973, and in 1990, the business grossed approximately $2 million. (Hunter, Tr. 444.) The company has twelve employees in Daytona and two employees in Alabama. And there is a third business in Texas in which Hunter holds a 50% interest. Hunter spends at least forty hours per week in connection with his blood bank business which involves out-of-town travel. (Hunter, Tr. 444.)

51. Hunter has not stated an intention to divest the business in which he may keep only a minority interest. Rather, he has only affirmed that there will be no activities that would negate HHRP's integration. (*See* HHRP's PFC at Exh. 4: there will be no activities to interfere with Hunter's integration.) At the hearing, Hunter testified that he had an agreement to sell a controlling interest in the business. In a one page letter dated May 2, 1988, Harry Gurley, who is deceased, confirmed discussions with Hunter wherein Gurley became familiar with the HHRP FM venture. (Terzynski Exh. 2.) Gurley stated that he was involved in other ventures with Hunter and he was therefore "familiar with the financial conditions of each partner." (*Id.*) Gurley stated that he was willing to purchase 20 shares of Montgomery from Hunter and that by issuing the letter, Gurley intended to give a reasonable assurance that HHRP will have funds for construction and operation. (*Id.*) There is no evidence of the total number of voting shares to measure 20 shares as being a controlling interest in Hunter's business. Nor is the letter a definitive commitment for Hunter to divest his business interests in order to devote full-time to the station. Gurley passed away in May 1989. (Hunter, Tr. 470.)

52. In another one-page letter dated April 10, 1988, Christopher C. Choporis, M.D. ("Choporis") states conditions under which he would purchase stock in APC. (Terzynski Exh. 3.) Choporis states that he is familiar with the financial condition of Atlanta and of HHRP. Choporis also states a willingness to purchase 51% of APC for a minimum price. But he further states that he is not making a purchase commitment. Hunter admitted that Choporis is not interested in acquiring the Alabama operation. (Hunter, Tr. 471.) Choporis is also seeking to give a

reasonable assurance of the financial ability to construct and operate. (*Id.)* However, this letter from Choporis to Hunter is not a definitive commitment for Hunter to divest his business interests in order to devote full-time to the station.

53. It is not sufficiently clear from the proof offered by HHRP to find that there is substantial evidence of Hunter's intention to divest his business interest in the blood laboratories at Daytona, Alabama, and/or Texas, i.e., APC. (*See* Paras. 51-52, *supra.*) The PFC filed by HHRP cites no evidence of Hunter's business interests and HHRP does not even address the issue of divestment. (*See* HHRP's PFC at 2-4 and 14-15.) In its RPFC, HHRP only points to the opposing arguments and argues that there is no evidence to support opponents' positions. HHRP has the burden of proof and yet HHRP admits that Hunter's plans for divestment were only "tentative." (Hunter Tr. 456 and HHRP's RPFC at 7.) HHRP relied on the broad testimony of Hunter to convince the fact-finder that Hunter was committed to a divestiture of APC. HHRP could not produce Gurley as a witness because Gurley was deceased and there was no corroborating evidence of Gurley's alleged interest in APC that was offered by HHRP. In fact, the Gurley letter was identified and offered by an opposing applicant.

54. HHRP failed to produce Dr. Choporis as a witness. Again, it was an opposing counsel who introduced the Choporis letter which was more in the nature of proof of financing sources than an offer to buy a business. There is evidence that the Texas operation is dormant. Hunter testified that the equipment for the Texas operation "is in storage, basically" and there are no employees in Texas. (Hunter, Tr. 457.) Insofar as the Alabama operation is concerned, Hunter testified that it deals with "very specialized [biological] projects." (Hunter, Tr. 456.) Hunter also testified that the products are being replaced by a biologically engineered product. (*Id.)* But the possible loss of market share would make it even more imperative for Hunter to spend more time with the Alabama facility in order to be able to sell it as a going concern. The evidence on that point which is relied upon by HHRP does not support a finding of an intent to divest.

55. There also are serious internal inconsistencies in HHRP's evidence (Hunter's testimony) and the arguments asserted in HHRP's reply brief. As indicated in the paragraph above, Hunter testified that the Alabama facility would eventually lose market share to a competing biologically engineered product. HHRP also offered testimony and argument that the Texas operation had no employees, had no real estate, and that its equipment was in storage. (Hunter, Tr. 457; HHRP's RPFC at 8.) Then, at the hearing, Hunter was specifically asked by the Presiding Judge what were his intentions with respect to Texas, to which he replied:

> I have a partner there, 50 percent partner, and I'm discussing merging with the Alabama operation and either selling that or forming it into one operation. At any rate, if he were to agree to that merger of those two operations, he [the partner in Texas] would take it over.

(Hunter, Tr. 472.) Hunter had initially attempted to create an impression that no one was in Texas to look out for the business. (*See* Para. 55, *supra.*) There was no mention of a partner until Hunter was asked the question. It also is found to be factually inconsistent and lacking in credibility to present the Texas operation as totally dormant and the Alabama operation as a venture that eventually will lose its market position and then argue that those diminished assets in separate states would reasonably be looked to as business targets for a merger. HHRP has failed in its proof to show that Hunter has a plan to divest himself from the Hunter Laboratories or from any segment of the APC businesses.

56. HHRP proposes Ms. Deans as its full-time sales manager. She will supervise the station's sales staff and she will supervise those persons who are involved with the content of the station's commercials. She will have the authority for the hiring and firing of sales personnel and related clerical staff. (HHRP Exh. 3 at 1.)

57. As in the case of Hunter, Deans testified in her written testimony that she would engage in no activities, whether employment or otherwise, that would interfere with her integration commitment. (HHRP Exh. 3 at 1.) For the past ten years, Deans has been a real estate sales agent in practice with her brother. She has not specifically promised to leave that activity in which, at the time of her testimony, she had accrued potential sales commissions in the sum of $50,000 pending their going to closing. (Deans, Tr. 490.) Altogether, she considered herself to be "doing quite well" in her real estate practice. (Deans, Tr. 490.) In connection with her work for the station, she testified that she would work basically on commission and that she intends to spend considerable amounts of time on the street selling with the salespeople. (Deans, Tr. 491-92.)

58. There would be an inconsistency with Deans' pledge to engage in no conflicting activities if she were to continue selling real estate. Since she has not promised specifically to abandon her lucrative real estate practice to devote full time and attention to the station, it is found that she may intend to continue to sell real estate at the same time that she is on the street selling advertising time for the station. And in view of her admitted deference to Hunter to make business decisions and the absence of any substantial involvement of Deans in prosecuting the application, it is found that Ms. Deans will not assume a policy role at the station. Rather, she will spend her time almost exclusively outside the station soliciting advertising for the station and thereby be in a position to continue to pursue her lucrative real estate sales.

Local Residence

59. Hunter promises to move to Holly Hill in the event HHRP is awarded the construction permit. (HHRP Exh. 4 at 2.) Since 1971, Hunter has resided continuously in either Ormond Beach or Ponce Inlet, Florida. (HHRP Exh. 4 at 1.) Ponce Inlet is 12 to 15 miles from Holly Hill and is outside HHRP's city grade contour. (Hunter, Tr. 439-40, 443; HHRP Exh. 4, Att. 1.) From 1971-73, Hunter resided in Ormond by the Sea which is not shown clearly to be covered by HHRP's city grade contour. (HHRP Exh. 4, Att. 1.) From 1973-77, Hunter lived in Ormond Beach which is located within the city contour. (*Id.)* From 1977 to the present Hunter has resided in Ponce Inlet. Therefore, Hunter receives no credit for residency in the city of license and only five years' credit for maintaining a residence within the city contour.

60. Ms. Deans has resided continuously within HHRP's city contour in Daytona Beach, Florida since 1971. If HHRP receives the grant, she will move to the Holly Hill

city of license. (HHRP Exh. 3 at 1-2.) HHRP is credited with twenty one years of Ms. Dean's residence within the coverage area.

Local Civic Activities

61. Hunter claimed that he has performed volunteer work for Citizens for Ponce Inlet during the period 1985-88; Town Council for a two month period in 1987; Ponce Inlet Volunteer Fire Department during the period 1980-81; American Cancer Society from 1988 to the present; Zoning Board, Volusia County Beach for a six month period in 1987; Halifax Sport Fishermen's Club during the period 1980-85; and three sailing organizations from 1985 to the present. (HHRP Exh. 4 at 2.) However, he is not a member of those organizations. (*Id.*) Hunter testified that he was a member of the Junior Chamber of Commerce for 2 years in the 1970s. He has not indicated where that organization is located. He was a member of the Downtown Business and Professional Association from 1980 to the present but "not in all years." He was a member of the Holly Hill Chamber of Commerce and the Daytona Beach Chamber of Commerce in the period 1987-1989. (HHRP Exh. 4 at 3.)

62. Deans is not a member of a local civic organization. She claims that she has performed volunteer work but most of such work occurred after the filing of HHRP's application. She volunteered at I-Care, Daytona Beach from 1988-1990 and in 1991. She performed volunteer services for the Children's Home Society for four months in 1990 and from February 1991 to the present. From 1985 to the present she has also volunteered in a "Jog-A-Thon", which is a once yearly activity that is held in connection with the Log Street Elementary School where her child is enrolled. (HHRP Exh. 3 at 2; Deans, Tr. 488-89.)

Prior Broadcasting Experience And Minority Ownership

63. HHRP claims no credit for past broadcast experience or for a minority preference.

Auxiliary Power Proposal

64. HHRP proposes to install auxiliary power at its studio and transmitter sites. (HHRP Exh. 5.)

WALO Broadcasting Limited Partnership

65. WALO is a limited partnership that was originally organized under the laws of Florida.[13] Mr. Ondra Williams ("Williams") is the general partner and he owns 20% of the equity. There are three limited partners, each owning 26.666% of the equity: Hamlin Beattie ("Beattie"), W. Charles McGinnis ("McGinnis") and Jake Rasor, Jr. ("Rasor").

66. The WALO Limited Partnership Agreement (WALO Exh. 2) is dated May 5, 1988, the date on which WALO's application was filed with the Commission. However, the Certificate of Limited Partnership was filed in Florida on August 24, 1988, and Williams testified that the agreement had not been signed and was not in existence on May 5, 1988. (CFCG Exh. 11; Williams, Tr. 835-36 and 842-43.) Williams also testified that there were some minor changes made in the draft of the agreement, but he could not account for the changes or who had made them. (CFCG Exh. 10; Williams, Tr. 837.) But there is no evidence of substantial changes having been made to the draft Agreement.

67. The genesis of the WALO venture arose out of a meeting at a hunting lodge in the winter of 1987-1988. A non-party to the agreement, Robert Haskins ("Haskins"), brought to the attention of the three limited partners the opportunity for investing in new FM stations. (WALO Exh. 4; McGinnis, Tr. 688-89.)[14] McGinnis, Rasor and Beattie had prior dealings together in a ranch, an agricultural operation and a hunting preserve. They also live in proximity to each other which facilitated periodic meetings. (McGinnis, Tr. 692.) Haskins had earlier invested in cellular applications which were profitable ventures for him. (McGinnis, Tr. 689-91.) Haskins believed that FM investments also were profitable. He suggested to the three limited partners that the entity with which he had worked, Capital Communications Group ("Capital"), was looking for investors in FM applications. (WALO Exh. 4.) Haskins gave the name of Bob Blow ("Blow"), an agent for Capital, as the person to contact. (McGinnis, Tr. 691.)

68. Hamlin Beattie contacted Blow and he reported back to McGinnis and Rasor that Capital would be willing to assist in finding an appropriate person to lead the applicant. For a flat fee of $10,000, Capital would locate a qualified general partner and would also arrange for an engineer and legal counsel. (McGinnis, Tr. 691-93.) McGinnis testified that $10,000 was paid to Capital. (McGinnis, Tr. 732.) Each of the Limited Partners invested about $3,500 to pay Capital's fee. (WALO Exh. 6 at 38.) Williams made no contribution towards Capital's fee.

69. On March 9, 1988, Blow of Capital sent a letter to Beattie advising him of the FCC's comparative preferences. Blow stated that "an ideal applicant would be a female minority (Black, Hispanic, Asian-American, American Indian, etc.) who is a local resident with a history of civic involvement who would propose to work at the radio station on a full time basis." (Terzynski Exh. 5 at 2). Beattie testified in deposition that he understood that if they found a general partner who had one or more of the preferences, it would enhance their chances of being selected. (WALO Exh. 6 at 18.) Blow also suggested a limited partnership structure with an equity split of 20% for the general partner and 80% for the limited partners. (*Id.*;

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[13] WALO states that "WALO is in the process of registering its partnership in the State of Delaware so that WALO will be recognized as a Delaware limited partnership." (WALO Exh. 1 at 1.) WALO has not explained the reason for such a change which post-dates its Integration Statement reporting that it is a Florida limited partnership. (WALO Exh. 5, p. 2.) Nor has WALO amended its application to report the completion of registration in Delaware. WALO states in its proposed findings that at the time of the hearing, WALO was in the process of becoming a Delaware partnership. (WALO's PFC at 28.) WALO's application was frozen on the "B" cutoff and it will be considered for comparative purposes to be organized as a Florida limited partnership.

[14] McGinnis was the only limited partner who was required to be present for cross-examination. The depositions of Beattie and Rasor had been taken and they were received in evidence in lieu of their appearances at trial. (See Deposition of Hamlin Beattie, August 20, 1991, *Walo Exh. 6* and Deposition of Jake Rasor, August 19, 1991, *WALO Exh. 7.*)

McGinnis, Tr. 706-07.) On March 29, 1988, Capital sent a letter to Beattie setting forth terms under which Capital would represent them in applying for a new FM station. Beattie signed the letter. (Terzynski, Exh. 4; McGinnis, Tr. 693.) The limited partners selected Holly Hill as the FM station which they would seek. That decision was reached among the limited partners before they selected a general partner. (WALO Exh. 4.) Thus, Williams had no say in the selection of the new station.

70. Blow reported that Capital had located and endorsed Mr. Ondra Williams, an African-American. (McGinnis, Tr. 702.) Williams testified that WALO's counsel told him that he was in touch with a group of people who were looking for someone like himself to participate in an application and that counsel had contacted Blow who in turn contacted Williams. Williams received the call from Blow in early 1988 and Blow asked if Williams was interested in forming a limited partnership with unnamed persons in order to seek a new FM frequency in Holly Hill. (Williams, Tr. 771-73.)

71. Blow arranged for Williams to meet with Beattie, McGinnis and Rasor. (McGinnis, Tr. 703, 773.) In April 1988, Williams flew to Greenville, South Carolina for a meeting with Beattie and the limited partners reimbursed Capital for Williams' travel expenses to South Carolina. (McGinnis, Tr. 704-05, 773; WALO, Exh. 7 at 12-13.)

72. McGinnis, Beattie and Rasor told Williams that if he were to join the group he would be the general partner, he would receive a 20% equity interest, and the limited partners would receive an 80% equity interest. They also told Williams that he would not be obligated to contribute any funds to the venture. (McGinnis, Tr. 706, 794.) Williams' employment history was discussed at the meeting and the limited partners were told that Williams was general manager of a small supply firm in Florida. They sought no information on whether that business had been successful or not. (WALO Exh. 6 at 67; WALO Exh. 7 at 13-14.)

73. There was only the one face-to-face meeting between WALO's limited partners and Williams in April 1988. (McGinnis, Tr. 731.) After the meeting, the limited partners had sporadic telephone conversations with Williams. Only one of the three, Beattie, contacted Williams and only Beattie would keep the other two informed. (McGinnis, Tr. 708.) There had been several meetings of the limited partners in which Williams was not involved. (WALO Exh. 6 at 97-98.)

74. In the Spring or Summer of 1988, Beattie suggested to Rasor and McGinnis that they accept Hugh Wilcox ("Wilcox") as a fourth partner.[15] Wilcox was close to being accepted and although McGinnis and Rasor vetoed Wilcox, Williams was not consulted. (WALO Exh. 6 at 48-50.) Counsel had even been contacted, had started drafting an amendment to include Wilcox, and was later told to remove from the agreement any amendment that included Wilcox. (WALO Exh. 6 at 55-58.) The WALO agreement requires the written consent of the general partner and the limited partners for the addition of a partner. (WALO Exh. 2 at 13.)[16] But there was no written consent, formal note or input from Williams in connection with Wilcox. (WALO Exh. 6 at 58.) And Williams testified that he had not formulated any opinion with respect to Wilcox becoming a limited partner. (Williams, Tr. 888-89.)

75. WALO's Limited Partnership Agreement at Section 5.5 also provides for the involuntary removal of the general partner by vote of the majority equity owners of the limited partners. Conditions for involuntary removal include assignments made by the general partnership for the benefit of creditors; filings in bankruptcy; appointment of trustee, receiver or liquidator; conviction of crime or adjudication of mental incapacity; and acts of malfeasance or wanton or willful neglect in connection with the operation of an FM station. (WALO, Exh. 2 at 10-11.) Williams is entitled to written notice of a removal on grounds of malfeasance or wanton or willful neglect and he may within ten days demand arbitration. (*Id.*)

76. Williams testified that upon moving to Florida in 1980 and finding no station that offered an "urban contemporary format," he decided to pursue a radio station. (WALO Exh. 3 at 1.) An unidentified engineer whom Williams had contacted advised him to await the allocations under the Commission's Docket 80-90 rulemaking. (*Id.*) According to Williams' testimony, Mr. Ralph Crossley, an African-American broadcaster in Atlanta whom Williams had contacted, referred Williams to communications counsel, the same counsel appearing for WALO in this case. Williams discussed with counsel the possibilities for acquiring a station in Daytona or Savannah. (*Id.*) Williams further testified:

> When the allocation for Hardeeville, S.C., which is close to my hometown of Savannah, GA, was made available for application, I put together a corporation, O.N. DRA Investment Corp. ("O.N. DRA"), to apply for it.[17] I was President and majority shareholder in O.N. Dra. With Jim Freeman as my counsel, I pursued the Hardeeville application through the discovery phase of the proceedings at which point the case settled. Pursuant to the settlement, my corporation dismissed its application.

(*Id.*)

77. Williams had asked Freeman to advise him of any opportunities in the Daytona area. In early 1988, Freeman advised Williams of the Holly Hill allocation. There was a jointly recognized difficulty for Williams to raise funds and Freeman was at the time working with another group, i.e., Capital: (WALO Exh. 3 at 2.)

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[15] It is noted that Wilcox and Beattie were limited partners together in an application for a new FM station at Pawley Island, South Carolina that was filed on June 29, 1988. The Pawley Island application was represented by the same law firm. In that case, a female minority was located by Capital to serve as general partner. (WALO Exh. 6 at 19-20, 48-50.)

[16] The Agreement specifies:

> *5.8. Right To Admit Partners.* No additional Partner shall be admitted to the Partnership, except by the written consent of the General Partner and the Limited Partner who, together with the General Partner, hold a majority of the interests in the Partnership.

[17] There was no evidence of a case docket or description of principles or a statement for the record of whether Williams' group was paid off or won the station.

> [H]e [Freeman] told me that he was working with a group that was putting investors with the ability and desire to back applicants together with entrepreneurs like myself who would prosecute the application and run the station in the event the application was granted. I indicated to Jim [Freeman] that I would be interested in speaking to these people and he told me that someone would contact me.

(*Id.*) Williams further testified, and it is found, that Blow contacted him and arranged a meeting among Williams, Beattie, McGinnis and Rasor.

78. It is found from these facts and circumstances that Williams was known to Freeman and Capital as available to participate as a racial minority in a speculative venture in seeking an FM license through the comparative process. It was understood when Blow contacted Williams that Williams would not be able to contribute capital and that Williams was an African-American who had earlier participated in a settlement in the Hardeeville proceeding. Therefore, Williams was known to Blow and the limited partners to qualify for a minority preference and to have familiarity with the comparative hearing process. Blow and the limited partners were actively seeking a racial minority who could be proposed for integration in order to strengthen the application. Williams was that person and Williams knew from Hardeeville that his racial minority status would be a positive factor in seeking the station in Holly Hill.

79. On March 9, 1988, Blow wrote a letter to Beattie on behalf of Capital which presented benefits for employing Capital's service. (Terzynski Exh. 5.) Capital also offered to assist in preparing a budget and in preparing a financial plan to enable the applicant to certify to its financial ability on Form 301. (*Id.*) Beattie signed a letter agreement with Capital dated March 29, 1988. (Terzynski Exh. 4.)

80. It is found that in furtherance of the express representation that Capital would locate communications counsel, Mr. Freeman was retained through Capital as WALO's attorney. Williams testified that he had no knowledge of the arrangement between Capital and Freeman and, therefore, Williams did not participate in the selection of legal counsel. (Williams, Tr. 814.) Freeman sent bills to Williams for services rendered to WALO but Williams did not pay those bills because the limited partners and Williams had misunderstood that Capital would pay the legal fees.[18] There was a conference telephone call held in March 1991 between and among Freeman, Rasor, McGinnis and Williams that clarified the obligation of WALO to pay the legal fees. (Williams, Tr. 815.) According to Williams' testimony that conference call was held sometime in 1991, three years after the letter agreement with Capital was signed by Beattie. (Williams, Tr. 815-16.)

81. Williams' financial commitment to the venture is only twenty dollars ($20.00). Williams, on instructions from counsel, opened a WALO partnership checking account in 1991. To Williams' knowledge, there was a bank account in the name of Holly Hill Associates which consisted only of the limited partners. That account had been opened before a WALO named bank account was opened in 1991. (Williams, Tr. 872.) According to Williams, counsel had earlier advised him to open a WALO checking account but Williams had not opened an account because he said that no expenses were being incurred. (Williams, Tr. 873.) Williams further testified that as the hearing date grew closer and it became necessary to pay fees, counsel reminded Williams to open an account. (Williams, Tr. 873.) But according to Rasor, at the time it became necessary to pay the Commission hearing fee Williams reported that there was no WALO checking account and that one was later opened "because we were trying to establish at that time a paper trail for WALO Broadcasting." (WALO Exh. 7 at 44.) Two WALO Broadcasting checks dated February 13, 1991, including the hearing fee in the amount of $6,760, were signed by Rasor, a limited partner. (CFCG Exh. 6.) But Rasor testified that the checks from the former Holly Hill Associates account were merely stamped "WALO Broadcasting" and were in fact issued by him from the Holly Hill Associates checking account. It is not clearly established by substantial evidence whether Williams had check signing authority in the WALO Broadcasting account.

82. It is found as fact that control over the disposition of litigation expenses was with the limited partners before and after the filing of WALO's application. Through 1991, the only checks issued were from the Holly Hill Associates account which was owned and controlled by the limited partners. (*See* WALO Exh. 7 at 17-18.) Williams sent copies of legal bills to the limited partners. It appears that after Williams opened a WALO account in 1991, he would pay legal bills out of the WALO account. But the monies first had to be deposited into that account from the Holly Hill Associates account, which was controlled by the limited partners, after the bill was seen and approved by the limited partners. It is found that the limited partners, and particularly Beattie, had full control over the partnership bank account and the disbursement of funds before and after the WALO application was filed and at least up until the date of the hearing.

83. Under the terms of the WALO agreement, the general partner was to use his reasonable best efforts to obtain bank loans for as near to 100% of the financing needs as may be possible. (WALO Exh. 2 at 5.) The evidence discloses that Williams made no such effort. Nor was he ever asked to do so. Rather, the limited partners obtained the financing.[19] Capital provided the limited partners with a form bank letter and McGinnis, who was on the local advisory board of South Carolina National Bank at

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[18] There was an initial fee paid to Capital by the limited partners in the amount of $10,000. (Para. 68, *supra*.) Bills for legal services received by Williams from 1988 to 1991 did not exceed $10,000. Therefore, Williams and the limited partners represent that they had assumed that legal fees were covered. (Williams, Tr. 816, 817.)

[19] And the limited partners even reserved their control over their capital investments. For example, McGinnis testified that he had not decided whether he would continue to make an equity investment. (McGinnis, Tr. 724-25.) The limited partners were authorized by the agreement to treat monies given to the partnership as a loan rather than a capital contribution and the consent of the general partner was not required. (WALO Exh. 2 at 6; WALO Exh. 6 at 78-80.) The inability of a general partner to rely on invested capital as not subject to withdrawal to repay "loans" adversely effected Williams' future control over construction and operation of the station.

Newberry (the "Bank"), obtained a commitment letter. (WALO Exh. 6 at 27-30, 104.) Williams had no contact with the Bank and his financial statement or guarantee were neither requested nor furnished. (Williams, Tr. 796.) The Bank letter, dated May 3, 1988, is addressed only to the three limited partners. The WALO Broadcasting name is not even mentioned in the letter. (Terzynski Exh. 6.) The limited partners had financial statements on file at the Bank as a result of an unrelated venture and new financials were not required. The evidence establishes that the loan commitment was not made to WALO but was made only to the three limited partners. And the partners were not required to give their guarantees to secure a loan. They only might do so if they chose to do so. (WALO Exh. 7 at 34-35.) There were no discussions between Williams and the limited partners as to what the terms of any loan would be. (McGinnis, Tr. 749-50.)

84. Williams' activities in the prosecution of the application were limited. Capital arranged for counsel, the engineer, and the antenna site. (Williams, Tr. 778-79.) Counsel did not advise Williams on the terms for the site regarding its availability or its cost or the length of the lease. (Williams, Tr. 790-91.) Williams received the Bank letter from counsel on May 3, 1988, just prior to signing and filing the application. (Williams, Tr. 779, 787.) WALO's law firm prepared the application which Williams reviewed before filing. (Williams, Tr. 782.) The programming statement was based upon Williams' outline and Williams provided the names of some organizations to use as EEO recruitment sources. (WALO Exh. 3 at 3.) Williams did participate to a minimal degree with Capital in the budget estimate which was based on a general budget for any Class A station that was not specifically tailored for Holly Hill. (Williams, Tr. 792-93.) Williams established WALO's public file which is maintained by a friend of Williams who resides in the Holly Hills area. Williams also handled the publication of the local notice of the hearing. (WALO Exh. 3 a 3.)

WALO's Proposed Integration

85. WALO proposes that Williams will be its full-time general manager for a salary that is yet to be determined. (McGinnis, Tr. 707, 734.) Williams will sever all business or employment activities at the time a construction permit is awarded to WALO. (WALO Exh. 3 at 4.) Williams will oversee all station operations, develop policies, prepare and supervise budgets and provide input and supervise the station's programming, sales and technical staff. (*Id.*) Williams will also hire key personnel and he will have ultimate responsibility for personnel matters. He will be responsible for EEO compliance and for the station's community relations efforts. (*Id.*)

Local Residence

86. WALO receives credit for Williams' past local residence within the proposed service area of the station. From June 1980 until December 1984, Mr. Williams lived at 1073 Madison Avenue, Daytona Beach. From May 1986 to February 1989, he lived at 340 Water Oak Lane, Ormond Beach. WALO receives credit for future local residence because Williams intends to relocate to Holly Hill in the event WALO's application is granted. (WALO Exh. 3 at 4-5).

Local Civic Activity

87. WALO claims no credit for local civic activities.

Prior Broadcast Experience

88. WALO claims no credit for past broadcast experience.

Minority Ownership

89. WALO claims a minority preference for Williams' status as an African-American.

Auxiliary Power Proposed

90. WALO represents that it will provide an emergency power system which will permit the station to continue operation in the event of an emergency. (WALO Exh. 3 at 5.). But Williams testified that he did not specifically budget for an auxiliary generator at the studio and that he did not have any specific understanding that the miscellaneous items in this budget include an auxiliary power generator. (Williams, Tr. 859-61.) WALO will not be credited with a firm plan to secure an auxiliary power system.

Michelle N. Terzynski

91. Terzynski is an individual applicant. She first learned about the availability of the Holly Hill frequency through an article in the *Daytona Beach News Journal*. She discussed the project with her husband who referred her to a friend in the broadcast industry who in turn referred her to her counsel. (Terzynski, Tr. 910, 927.)

92. Terzynski retained counsel in mid April 1988. Counsel provided her with a draft of Form 301, which included a programming statement, and they worked together, *via* telephone, in finalizing the document. (Terzynski, Tr. 917-19.) Terzynski personally located her antenna site and her counsel negotiated the terms of its availability. (Terzynski, Tr. 913, 920, 929.) Counsel recommended an engineering firm. Terzynski accepted the recommendation, contacted the engineer, and she consulted directly with the engineer on the engineering disclosure in her Form 301. (Terzynski, Tr. 920.) Counsel also assisted Terzynski in formulating an estimate of construction and operating costs. (Terzynski, Tr. 914-16, 928.) The discussions about the budget were on the telephone and counsel sent actual categories and dollar amounts to Terzynski. (*Id.*) The evidence establishes that the budget figures were provided by counsel and were used by Terzynski without change.

93. Monies used for the prosecution of Terzynski's application and to be used for construction and initial operation of the station are from the joint funds of the applicant and her spouse. Approximately 40% of the funds in Terzynski's personal account are accounted for by regular deposits of her spouse's salary. (Terzynski, Tr. 929.) But her husband has no check signing authority for that account. Funds for her venture are also used by Terzynski from a joint money market account. Her spouse knew that monies were being withdrawn from that account, they discussed the amounts of the withdrawals and, presumedly, the purposes for the expenditures. (Terzynski, Tr. 911-12, 916.)

94. Terzynski and her spouse at one time owned a company known as Mr. Big's. The business was sold and Terzynski plans to use proceeds from the sale to construct the station. Those monies will account for more than half of the funds. But there is no evidence of a waiver or assignment with respect to her husband's half. (Terzynski, Tr.

937.) Therefore, the spouse's concurrence for the use of his funds (or his portion of the funds) will be needed to complete construction. (Terzynski, Tr. 921-23.) It is reasonable to assume that he will permit the money to be used in the venture. Terzynski's spouse has in the past provided his own money for her automobile. (Terzynski, Tr. 924.) Her spouse, who is an insurance agent, may realize some monetary gain from the sale of insurance to the station. (Terzynski, Tr. 925.) Therefore, past conduct of making funds available to Terzynski for her use and a commercial benefit for the spouse if she is awarded the station are facts that support the finding that she will have funding to construct and operate.

95. Terzynski's spouse's funds in a substantial amount will probably be needed as a financial source for construction of the station. There is evidence in the record that counsel had hired an appraiser to determine the possible sale value of the station. (Terzynski, Tr. 930-31.) It was made clear through cross-examination that the appraiser measured only a predicted amount that could be realized in a future sale. There was no consideration by the appraiser of potential revenues in the station's operations. (Terzynski, Tr. 931.) Terzynski testified in that same subject area that she may have discussed with her husband whether the station was monetarily worth pursuing. (Terzynski, Tr. 930.) It is found that Terzynski and her husband considered an appraised future sale value in connection with the spouse's willingness to have his funds used in the construction and operation of the station. That participation by the spouse in an economic assessment of a resale value is further evidence of his intent to allow his monies to be used to construct and operate.

Terzynski's Proposed Integration

96. Terzynski proposes to be integrated in the management and operation of the station on a full-time basis. She will be general manager of the station. In that capacity, she will be responsible for setting policy and supervising all areas of station operations, including financial management and planning, personnel, programming and sales. (Terzynski Exh. 1 at 1.) Terzynski testified that she may also act as sales manager. (Terzynski, Tr. 933.)

97. Terzynski has never worked at a radio station. (Terzynski, Tr. 932.) When asked how long she planned to operate the station, she indicated that she could not answer the question because it depended upon such variables as business conditions and her feelings at the time. (Terzynski, Tr. 925.) As found above, she did obtain an appraisal of the sales value of the station. (Terzynski, Tr. 930-931.

98. Terzynski is employed selling time-shares. She has pledged to terminate her current employment in the event her application is granted. Terzynski has made no plans for someone to take over her job. (Terzynski Exh. 1 at 1; Terzynski, Tr. 920-921.) But there is no evidence of an on-going business that would fail without a replacement or any competing economic incentive that would induce her to lessen her commitment to full-time integration into the station's operations and business.

Local Residence

99. Terzynski has resided in Ormond Beach, Florida since 1979, which is within the 1 mV/m contour of her proposed new station. (Terzynski Exh. 1.)

Local Civic Activities

100. Terzynski has been active in several local civic organizations. She performed volunteer library work for the Ormond Beach Elementary School PTA in 1988-89, and she worked as a volunteer in the school's annual carnival in 1985-90. She served as a volunteer cooking demonstrator at a fundraiser in 1980 for St. Jude's Hospital. She also volunteered as cook demonstrator at fundraisers for the Ormond Beach Women's Club in 1979-86. She was a volunteer cook for the Sea Breeze High School home economics class in 1985. She was a volunteer speaker in 1983 at the Ormond Beach Garden Club. She loaned cooking equipment to the annual Christmas event for the House-City of Ormond Beach in 1981-87. In 1981 she was a speaker at the Ormond Beach Rotary Club. She loaned cooking equipment to the Ormond Beach Memorial Hospital in 1982-84 for a fundraiser. She was a volunteer at annual fundraisers in 1979-83 for the Women's Pilot Club Home Show. And she participated in 1986-89 in a neighborhood watch program for the Woodmere South community. (Terzynski Exh. 1.)

101. Terzynski testified that she did not know the purpose for or activities of the Women's Pilot Club. (Terzynski, Tr. 905.) She will be given no credit for that activity. Also, she was in the business of selling microwave ovens. (Terzynski, Tr. 905-06.) Therefore, she will not be credited for her cooking demonstrations at St. Jude's Hospital in 1980 and at the Women's Club from 1979-86. She had a child attending Ormond Beach Elementary School PTA when she volunteered for library work. (Terzynski, Tr. 907.) But the activity was civic oriented and would provide insights into community needs.

Prior Broadcast Experience

102. Terzynski asserts no claim for broadcast experience.

Minority Ownership

103. Terzynski asserts no preference based on minority race.

Auxiliary Power Proposed

104. Terzynski proposed to install auxiliary power generators at both her proposed studio and transmitter site to ensure continuous operation in the event of commercial power failures. (Terzynski Exh. 1.)

CONCLUSIONS OF LAW

105. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service and an assessment of the evidence must be made under the applicable Commission standards in determining which applicant meets the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965) ("Policy Statement").

106. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F.C.C.*, 735 F.2d 601, 603-07 (D.C. Cir. 1984). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and manage-

ment and the enhancement of such integration by local residence, civic activities, broadcast experience and minority racial preference.[20]

Comparative Proposals

107. Before conducting the comparative analysis, a determination of the basic qualifications of CFCG must be made. *Louis Adelman*, 28 F.C.C. 432 (Comm'n (1960), *recon. denied* 29 F.C.C. 1223 (Comm'n 1960), *aff'd sub nom. Guinan, et al.* v. *F.C.C.*, 297 F.2d 782 (D.C. Cir. 1961). There are also substantial questions raised about integration proposals and their reliability or *bona fides* which will be considered under the standard comparative issue. *See, e.g., N.E.O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986). *See also Royce International Broadcasting*, 5 F.C.C. Rcd 7063 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 2601 (Comm'n 1991) (appropriate to analyze integration proposals under a comparative issue in terms of their overall reliability). Here there is substantial evidence to consider on the issues of the *bona fides* and reliability of WALO's and HHRP's integration proposals and particularly the commitments of Deans and Hunter to leave their current businesses to integrate full time into the station's operations and the control exercised over WALO's affairs by its limited partners.

Diversification

108. It is concluded that none of the four applicant parties owns an attributable interest in a means of mass communications. (*See* Paras. 8-10, *supra.*) Therefore, no party receives a comparative diversification credit or demerit. *Policy Statement, supra* at 394-95.

Comparative Coverage

109. The parties were required to submit evidence on comparative coverage because such evidence was called for under the *HDO*. A joint engineering exhibit which was received in evidence showed by substantial evidence that there are no significant differences between the proposed signal coverages of the areas and populations within the respective Grade B contours. (*See* Para. 12, *supra.*) Accordingly, it is concluded that no party receives a comparative credit for a superior proposed signal coverage.[21]

CFCG' s Basic Qualifying Issues

CFCG's Financial Qualifications

110. CFCG's financial certification must be assessed under the reasonable assurance standard. *Scioto Broadcasters Limited Partnership*, 5 F.C.C. Rcd 5158 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 4626 (Comm'n 1991). There is no issue with respect to the reasonable assurance of CFCG's costs estimation at $378,100. *Cf. Armando Garcia*, 3 F.C.C. Rcd 1065, 1067 (Review Bd 1988) (good faith effort required to estimate cost to construct and operate). The issue here is whether at the time of certification was CFCG financially qualified and if so, whether CFCG is also presently financially qualified. The burden of demonstrating that it possesses basic qualifications to be a Commission licensee is on the applicant. *Midwest Radio-Television, Inc.*, 24 F.C.C. 2d 625, 626 (Comm'n 1970). For reasons stated below, it is concluded that CFCG had no reasonable assurance at certification and presently has no reasonable assurance of adequate funding for the construction and operation of a broadcast station.

111. The Commission has held that an applicant which certified to its financial qualifications and is faced with an added issue could show at hearing that it had a reasonable assurance of committed funds when it filed its application. *Northampton Media Associations*, 4 F.C.C. Rcd 5517, 5518-19 (Comm'n 1989). But the applicant must adduce probative evidence to establish that it had a reasonable assurance of the funds at the time of certification. *See Aspen FM, Inc.*, 6 F.C.C. Rcd 1602 (Comm'n 1991). In order to prove reasonable assurance at time of certification, the applicant must provide substantial and reliable evidence showing sufficient net liquid assets on hand or committed sources of funds to construct and operate for three months without revenue. *Rebecca L. Boedker*, 5 F.C.C. Rcd 2855 (Comm'n 1990). Based on the findings above, CFCG has failed to adduce probative evidence that on May 5, 1988, Mr. and Mrs. Cherry had net current liquid assets in the amount of $378,100. Mr. Cherry had prepared a financial statement dated April 1, 1988, which reflected total assets of $859,500. (CFCG Exh. 5 at Tab 2.) But there is no reasonable basis to consider that there were sufficient net liquid assets based on that statement. Rather, the probative evidence shows that at certification, Mr. and Mrs. Cherry had a reasonable assurance of only $181,500 of liquid assets resulting in a shortfall in liquid funds in the amount of $134,800. (*See* Para. 28, *supra.*) This substantial shortfall of funding disqualifies CFCG from comparative consideration. *See Marlin Broadcasting of Central Florida, Inc.*, 5 F.C.C. Rcd 5751 (Comm'n 1990) (Commission held that applicant's failure to demonstrate reasonable assurance of required funds on date of certification warranted disqualification). Although the issue of present financial ability becomes moot, the showing of liquid assets does not substantially improve in the Cherrys' later financial statement of June 30, 1991 and there is no showing of a present assurance to finance. (CFCG Exh. 5 at Tab 48.)

112. The facts presented by the Cherrys cannot be accepted as a basis for a conclusion of a reasonable assurance at certification. Based on a financial statement prepared by her husband, Mrs. Cherry may have thought that she and her husband had $859,500 in liquid assets. Therefore, there was no misrepresentation or intent to misrepresent found on the part of the Cherrys. But the standard of reasonable assurance is an objective one and the evidence offered by

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[20] Terzynski, Deans and Mrs. Cherry have sought a gender preference. The gender preference has been held to be in violation of the Fifth Amendment to the United States Constitution. *Jerome Thomas Lamprecht* v. *F.C.C.*, 958 F.2d (D.C. Cir. 1992). Therefore, no applicant receives a gender preference in this case.

[21] The stipulation was based on the statement of a qualified engineer who affirmed that he reviewed the engineering sections of the respective applications, that he plotted the 60 dBu field strength contours of the three competing applicants on a single 1980 census map, and that he concluded from his review that there are no significant differences in the areas and populations proposed to be served. (Jt. Engineering Exh. and Stip. 1.)

CFCG to support a finding of over $800,000 in liquid assets is found to be wholly unreliable. For it was *after* certification that 48 tabs of documents were assembled by Cherry, Sr. in an attempt to verify after the fact an assertion of a reasonable assurance of sufficient funding. (CFCG Exh. 5 Tabs 1-48.) In one instance, a snapshot was taken of a business bank account which had recently received a $12,000 deposit. (Para. 31, *supra.*) Real estate values were calculated from insurance policies. (Paras. 35-36, *supra.*)[22] And there were varying estimates of the cash surrender values of life insurance policies at $44,035, $55,535 and $80,500. (Paras. 30-34, *supra.*) Finally, Mr. Cherry retained an accounting firm in an effort to present their assets in the most favorable light. But the accountants understandably hedged their report because the Cherrys elected to omit substantially all of the disclosures that are required under generally accepted accounting principles. (Para. 36, *supra.*) The financial statements are rejected as unreliable representations of the Cherrys' net liquid assets on the date of certification. *Cf. Star Stations of Indiana, Inc.*, 51 F.C.C. 2d 95, 100 (Comm'n 1970) (testimony to be accorded weight to which it is entitled in light of all relevant facts and circumstances including detracting evidence). Substantially the same infirmities apply to the later financial statement dated as of June 30, 1991. (*See* Para. 34.)

113. Also, the Presiding Judge has considered a bank letter issued on July 28, 1989. The letter was obtained by Mr. Cherry from the Florida National Bank which was subsequently merged into the First Union Bank. There is no evidence that First Union would abide by the predecessor bank's commitment. *See Salt City Communications, Inc.*, 7 F.C.C. 4221 (Review Bd 1992) (lending limits of financial institution not taken into account). *See also Texas Communications Ltd. Partnership*, 7 F.C.C. Rcd 3186 (applicant may not rely on commitment letter of bank that has become insolvent). The nature of the commitment letter is an expression of an intention. It is not a commitment bound by contract to later extend a loan to the applicant. It merely commits a bank to later considering the making of a loan if certain conditions are met and if market conditions are appropriate for such loans. Florida National Bank had its own policy about extending loans at the time it issued its letter to Mr. Cherry. Florida National Bank could give a reasonable assurance since the local bank officials knew Mr. Cherry and they knew the bank's policy about future loans for broadcast ventures. But people and lending policies may change when banks are merged. CFCG had the burden of proof to show that there would be no change of position with respect to First Union Bank. The best evidence would be a commitment letter from the new bank or an adoption in writing by First Union Bank of the Florida National Bank letter. No such letter or writing was produced. *Cf. Coast TV*, 7 F.C.C. Rcd _____, Review Bd *Slip Op.* FCC 92R-76, released September 22, 1992 at Para. 5 (specific finding made that successor bank stated that the prior letter was still in effect). Therefore, it is concluded that CFCG has no reasonable assurance of financing from a bank. As a result, CFCG is not presently financially qualified to construct and operate a broadcast station.

CFCG's Failure To Report Under Section 1.65

114. Under Section 1.65, a party has an obligation to maintain an application "substantially accurate and complete in all significant respects." 47 C.F.R. Section 1.65. Amendments to comply with that disclosure requirement must be filed within 30 days of the reportable event. *Id.*

115. The circumstances surrounding the obtaining of the bank letter on July 28, 1989, included a prior loan in January 1989, to Charles II in order for Charles II to purchase a controlling interest in Station WPUL-AM. The loan to Charles II could have caused the Cherrys to reassess their initial self-financing and could have resulted in their seeking a bank letter to shore up the financing. There is no business reason given by the Cherrys for going to the trouble to obtain a bank letter, except to obtain some comfort on the advice of counsel. Apparently, the reason that the Cherrys decided to seek a bank letter was because their counsel had advised them that a bank letter was an acceptable method to demonstrate a reasonable assurance. Mrs. Cherry testified that she did not even know what obligations she had under Section 1.65. (Para. 32, *supra* fn. 10.) If it was considered sufficiently important to seek a bank letter for purposes of shoring up a reasonable assurance on the basis of legal advice, it becomes a significant fact to be reported as an amendment to CFCG's financial certification. *See Merrimack Valley Broadcasting, Inc.*, 99 F.C.C. 2d 680, 683-83 n.9 (Comm'n 1984) (matters of decisional significance must be reported.)

116. It cannot be determined whether the bank letter was sought as a direct result of the loan to the Cherrys' son. It would be speculative to conclude that the loan was a material fact requiring disclosure unless the loan was the proximate cause of the bank letter. An intent to conceal the loan if shown to be a concealment in the context of a reason for failing to disclose the bank letter would provide evidence of an intent to deceive. But there is no such evidence developed and there can be no disqualifying violation unless there is substantial evidence of an intent to deceive. *See Gary D. Terrell*, 102 F.C.C. 2d 787, 790 (Review Bd 1985). Also, the letter was disclosed in discovery and the parties were not misled. Therefore, there will be no violation found against CFCG under Section 1.65.

CFCG's Bona Fides And Reasonable Assurance Of Integration

117. CFCG is a family venture. It is losely organized with only stock subscription agreements (Para. 39, supra.) However, it is established as a Florida corporation and is sufficiently organized as a family venture. *See Pacific Television, Ltd.*, 2 F.C.C. Rcd 1101, 1104 (Review Bd 1987) (functional equivalent of subscription agreements were acceptable to the Review Board). Although Mrs. Cherry holds 60% of the equity, the venture has been treated as a joint enterprise of husband and wife. The Cherrys are enterprising people who have investments in a newspaper and a real estate venture. Two sons who are non-voting shareholders own controlling interests in a local AM station at which Cherry, Sr. works without pay as station manager. Cherry, Sr. has committed to leave that position

[22] None of the claimed real estate values are supported by appraisals. One property is the Cherry's principal residence which is not property held for investment or resale. Real estate which is unappraised cannot be considered a liquid asset for financial certification. *Christian Children's Network, Inc.*, 101 F.C.C. 2d 612, 614 (Comm'n 1985).

in order to devote full time to the Holly Hill station. The Cherrys also will assign their interests in *The Daytona Times* newspaper to their children. (*See* Para. 9, *supra.*)

118. Cherry, Sr. has considerable business experience as well as substantial broadcast experience. He told his wife of the Holly Hill opportunity and he retained the venture's first counsel. His son, Charles II, an attorney, prepared the papers of incorporation. After CFCG's initial counsel withdrew, Charles II was induced to sign a stipulation on coverage as CFCG's attorney. But that evidence fails to show any other legal work that he performed. Mrs. Cherry is a retired school teacher who would work at the newspaper from time to time. She will be director of public affairs. Her husband, who is a 40% voting shareholder with experience in broadcasting, will be the station's general manager.

119. Both Mr. and Mrs. Cherry qualify for a racial minority preference. If there were still a female preference, Mrs. Cherry would gain yet another preference. That probably accounts for her 60% interest. But Mr. Cherry is not an undisclosed principal for whom his wife is fronting. And in view of her extensive civic involvement, Mrs. Cherry would be able to perform well her station duties in public affairs. There is no evidence that she is actually a passive participant who was put in a position of responsibility by strangers in order to gain a preference. In view of the totality of the circumstances surrounding CFCG's integration proposal, it is not shown by substantial evidence that there was lacking a *bona fide* intent to carry it out.

120. But there are several overlaps that raise suspicions about the *bona fides* of the proposal which should be resolved. There are two sons who are non-voting investors whose shares were in effect paid for by the father or which could be considered gifts. But the voting control of the parents in CFCG is absolute and there is no evidence of policy or management involvement on the part of the sons. Charles II performed only some perfunctory ministerial services. It also is noted that Cherry, Sr. manages, without pay, his sons' AM station. But there is no evidence to show how that circumstance would undercut Cherry,Sr.'s ability to manage the Holly Hill FM station. And Cherry, Sr. will leave his unpaid job at the AM station if CFCG receives the grant so that there would be no conflict with his integration responsibilities at Holly Hill.

121. Another concern is the joint ownership of Mormen Realty by Cherry, Sr. and his son. Mormen has title to several properties that might be liquidated to meet construction costs. Charles II owns 75% of Mormen and there is no evidence of any willingness or formal agreement on the part of Charles II to liquidate those properties. (*See* Para. 35, *supra.*) Thus, there is a potential for control exercised by Charles II through his ownership of Mormen. But there is no evidence of prior conduct or admissions that would support a finding of a potential dominating control over CFCG by Charles II.

122. There is no finding of substantial evidence to counter the *bona fides* of the integration plan proposed by CFCG. Similarly, there is no substantial evidence to show that Mr. and Mrs. Cherry would continue to share control over *The Daytona Times* or that they would not honor their promise to assign their respective ownership interests in the newspaper to their children. (*See* Paras. 9-10, *supra.*) There is no evidentiary basis to reject CFCG's integration proposal or to assign CFCG any diversification demerit. *See Royce International Broadcasting*, 5 F.C.C. Rcd 7063, 7064 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 2601 (Comm'n 1991) (integration proposals rejected only where principal holding small or passive interest can dominate affairs, or undisclosed owner can exercise significant control, or active principal has exercised little control). None of the conditions of *Royce* apply under the evidence in this case with respect to CFCG's integration or diversification proposals.

HHRP's Bona Fides And Reasonable Assurance Of Integration

123. HHRP purports to be a general partnership wherein both Deans and Hunter would have equal authority and control. Under the evidence in this case, there is no reasonable assurance found that HHRP will operate as a general partnership between Deans and Hunter. *See Houston Family TV, Ltd.*, 101 F.C.C. 2d 661, 667 (Review Bd 1985) (only where applicant sets forth a specific integration proposal, does not depart from it, and provides "reasonable assurance" that it will be carried out will the Commission credit the proposal). *See also Bradley, Hand & Triplett*, 89 F.C.C. 2d 657, 662 (Review Bd 1982).

124. By express terms of a written agreement, the business of HHRP will be conducted by consensus and without any formal voting procedure. (Para. 47, *supra.*) The partners believe that the partnership may be terminated at will (Para. 47) which amounts to a structure of nonpermanency that would be contrary to Commission policy. *See Policy Statement*, 1 F.C.C. 2d 393, 395 n. 6 (it is important that integration proposals be adhered to on a permanent basis). The agreement also specifically contemplated a structure that would enhance comparative credit and the Commission was awarding female preferences when HHRP filed. (*Id.*) Therefore, there was a motive to structure HHRP's proposal in a way that its form would be substantially different than its substance, i.e., to gain a comparative female preference.

125. Substantial evidence in the record requires the conclusion that the "consensus" contemplated by the partnership agreement means that Deans will concur in all business decisions of Hunter because, in the words of Deans, she would defer to Hunter if there was no agreement. (Para. 47, *supra* and Deans, Tr. 479-80.) Deans made a candid admission that in view of Hunter's 90% equity ownership, Hunter would also have the majority decision-making power. (*Id.*) *See Uniform Partnership Act* Section 11 (an admission by any partner is evidence against the partnership). The evidence establishes that Deans did not negotiate for her 10% ownership interest. Rather, her ownership interest was designated for her by Hunter.

126. The Commission has held that it is appropriate to look beyond the stated structure of an applicant in evaluating integration credit to determine whether or not the claimed integration proposal will be effectuated as a matter of fact. *Cascade Video, Inc.*, 99 F.C.C. 2d 1001 (Review Bd 1984). Here, there are other facts that support the conclusion that there is no reasonable assurance that HHRP will meet its proposal to operate as a Deans-Hunter general partnership. Hunter has assumed virtually all responsibility for HHRP's formation and the prosecution of the application. He retained counsel and an engineer, arranged for financing and personally loaned monies to the venture. (Para. 48, *supra.*) HHRP can point to no substantial acts or payments on the part of Deans. Deans' participation is found under the totality of the evidence to be only for the purpose of obtaining a female preference.

127. There are additional reasons for rejecting HHRP's integration proposal. Both Deans and Hunter have represented that they would engage in no activities that would interfere with their management duties. *See* Paras. 51, 57, *supra.*) That language is not an unconditional commitment to full-time integration and it would be left to Deans and Hunter to determine what non-station business activities would or would not interfere with their respective station management duties as full-time sales manager and general manager. The Review Board has held:

> Generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leiniger - Geddes Partnership*, 2 F.C.C. Rcd 3199 (Review Bd 1987), *rev. denied*, 3 F.C.C. Rcd 1181 (Comm'n 1988); *Ft. Collins Telecasters*, 103 F.C.C. 2d 978, 985-86, *rev. denied*, 2 F.C.C. Rcd 1780 (Comm'n 1987).

Naguabo Broadcasting Co., 6 F.C.C. Rcd 912, 924 n.63 (Review Bd 1991). *See also Pleasure Island Broadcasting, Inc.*, 6 F.C.C. Rcd 4163, 4165 (Review Bd 1991).

128. The evidence does not establish an intent by Deans and Hunter to abandon substantial business interests. Deans is a successful real estate agent who has made no specific showing of an intent to abandon her practice. In fact, she admitted that as sales manager she would be spending most of her time on the streets selling. That hands-off approach to managing away from the station would readily facilitate the continuation of her lucrative real estate sales activities. And it would be left to Deans to determine whether or not her real estate sales activities would interfere with her station sales activities. The Commission has been specifically concerned where, as here, outside business involvements are near the station because of the evident ease with which generalized commitments could be breached. *Kevin Potter*, 7 F.C.C. Rcd 4342-43 (Comm'n 1992). Hunter, on the other hand, owns laboratories in Daytona doing business as Atlanta Plasma Corporation which grossed $2 million in 1990. (Para. 51, *supra.*) There are related business interests of Hunter's in Alabama and Texas. There is no evidence of a plan on how and when Hunter will divest himself from all or even some of those substantial business interests. In fact, his explanation was so contradictory about his Texas operation that it is rejected as incredible and unreliable evidence. (*See* Para. 55, *supra.)* And as with Deans, Hunter has not made an unequivocal commitment to divest. The letters introduced by competing applicants which are relied on as evidence of genuine intentions to divest are actually, on examination, relevant to financing of HHRP's proposal. But they are not reliable evidence of a Hunter commitment to divest. (Paras. 51-52, *supra.*)

129. Under such facts and circumstances as are found with respect to Deans and Hunter, the need for proof beyond promises and projections has been emphasized by the Review Board:

> - - - integration credit has been denied to applicants with significant interests because, quite obviously, "the very existence of [any] other interests renders questionable [the integration] commitments in the absence of an additional showing by the applicant of the reliability of its integration proposal . . .." *Blancett Broadcasting Co.*, 17 F.C.C. 2d 227, 230 (Rev. Bd 1969) (emphasis added). [Subsequent citations omitted.]

Pleasure Island Broadcasting, Inc., 6 F.C.C. Rcd 4261, 4165 (Review Bd 1991). The Review Board has applied these authorities in denying an applicant any integration credit where the applicant had

> - - - made no weighty showing at all, let alone a persuasive one, as to how he will spend 50-60 hours per week managing a fledgling station in Orange Beach, while devoting (he says "only") 15 hours a week to another significant business concern - - -.

Id.

130. In the final analysis, the Commission has held that "[a]pplicants have the burden of proof to establish how they will effectuate their integration proposals." *Cuban - American Limited*, 5 F.C.C. Rcd 3781, 3785 (1990); *Julia S. Zozaya*, 5 F.C.C. Rcd 6607 (1990) (applicant retaining business interest denied integration credit). *See also Berryville Broadcasting Co.*, 70 F.C.C. 2d 1, 11-12 (Review Bd 1978). In this case, HHRP, Deans and Hunter have offered no "demonstrative evidence" or "convincing plan" and neither has made a "weighty showing" to overcome the presumption that the retention of a lucrative real estate practice and a multi-million dollar business will interfere with the respective integration proposals. *See Blancett Broadcasting, supra* and *Pleasure Island Broadcasting, supra. See also Naguabo Broadcasting Corporation, supra* (need for detailed accounting noted where other business interests readily lend to freely dividing time between a local business and the station business). And where Ms. Deans, a seasoned real estate salesperson, expects to be out and around soliciting broadcast advertising, this stricture of the Commission in *Naguabo* and the concern expressed in *Kevin Potter* are particularly applicable.

131. The Commission requires that applicants make a specific record showing of how outside interests will be accommodated. *Kennebec Valley Television, Inc.*, 2 F.C.C. Rcd 1240, 1241-42 (Review Bd 1987), *modified on other grounds*, 3 F.C.C. Rcd 4522 (Comm'n 1988). It is found that Hunter dissembled in his testimony concerning his plans for his ongoing business. (*Paras.* 51-56.) Hunter sought to convince the Presiding Judge that he had an agreement to sell a controlling interest in APC, a company which had grossed $2 million in 1990. The business of the company is blood analysis and storage and there was no evidence offered that it was a declining industry. Nor were there any written agreements for the sale of the business offered into evidence by HHRP. Two letters were introduced against HHRP by opposing applicants which were found not to constitute agreements. One of those persons was deceased. But HHRP did not seek to put on oral testimony of the author of a second letter, Dr. Choporis. The familiarity noted in the letters with HHRP's venture in Holly Hill indicates that the letters are more in the nature of assistance for HHRP's financial qualifications or possibly expressions of interest in investing in the FM venture. If Hunter is losing market share as he contends, he is likely to spend more time as a prudent business person at the laboratory business to increase market share in order to attain the highest profit in a sale. In that case, Hunter would have even less time to devote to the station. Finally, Hunter was attempting to portray the Texas operation as

being totally unattended without disclosing the fact that he had a partner in Texas who allegedly would take over the Alabama and Texas operations if a merger could be finalized. (*See* Para. 55, *supra.*) But that partner was not disclosed until the Presiding Judge questioned Hunter and that partner was never produced as a witness to support Hunter's claims of divestment intentions. Therefore, Hunter's testimony is rejected as totally unreliable evidence.

132. HHRP admits that Hunter's divestment plans are "tentative" and fails to address divestment evidence in proposed findings. (Para. 53, *supra.*) The failure to unconditionally pledge divestment is a basis for rejecting an integration proposal. *Woods Communications Group, Inc.*, F.C.C. Rcd 4604-05 (Comm'n 1992). *See also Royce International Broadcasting, supra.* Thus, HHRP's integration proposal is rejected because HHRP has failed to show by a preponderance of substantial evidence that there is a reasonable assurance that Deans and Hunter will operate the station as general partners and that each will devote full-time to the station's business. Nor will there be any credit for part-time integration because the record is devoid of any evidence showing the specific number of hours that could be devoted by Hunter or Deans on a part time basis. *See Marlin Broadcasting*, 5 F.C.C. Rcd 5751, 5754 n.15 (Comm'n 1990).

WALO's Bona Fides And Reasonable Assurance Of Integration

133. WALO purports to be a limited partnership that is controlled by its appointed general partner, Mr. Ondra Williams. The evidence establishes that Williams was recruited by Capital's Blow who had promoted a limited partnership with funds to be invested by three limited partners. Mr. Williams was selected because he would qualify for a minority racial preference. Blow and Capital arranged for Williams to be flown to South Carolina for an interview with the limited partners. Williams did not attend later meetings among the limited partners. Williams was not even consulted on a potential new partner who was seriously considered by the limited partners. The record does not support a conclusion that there is any reasonable assurance of Williams later conducting WALO's business as general partner.

134. Williams paid only $20.00 for his 20% interest in WALO. He performed no services in locating or obtaining a site. Beattie, a limited partner, contracted on behalf of the three limited partners with Capital for Capital's services. Williams played no role in the selection or supervision of Capital. In fact, Williams was nominally made the general partner of WALO under the agreement of May 8, 1988, after the limited partners retained Capital. There was no provision under the agreement or in any subsequent document which creates a contractual relationship between WALO, Williams and Capital. Capital selected counsel, who introduced Williams to Blow, and fees were paid by the limited partners. All business was conducted by the limited partners through their own checking account from 1988 to 1991, and it was not until just prior to the hearing that a WALO checking account was opened in order to make the proper "paper trail" for WALO. The limited partners also obtained the financing commitment through a bank that was used by the limited partners for other ventures. Williams had no contact with the bank and the bank did not request nor was it given any information or financial data regarding Williams. Williams was not even a partner when the bank issued its letter and the letter does not contemplate a future loan to WALO or any other entity that is controlled by Williams or in which Williams will participate.

135. The only active role assumed by Williams was to set up a local public file, which he arranged to have maintained by a friend, and to arrange for local publication. (Para. 84.) The budget that he purportedly prepared was a general budget for any Class A station with costs already appearing in the document. Based on an analysis of his testimony, Williams cannot be found to have significantly participated in estimating and preparing a budget for WALO. (Para. 84 and Williams, Tr. 791-93.

136. In *KIST Corp.*, 102 F.C.C. 2d 288, 292-93 (Comm'n 1985), the Commission rejected integration for a purported integrated owner of the applicant who came to the venture as a stranger, who was found not to be significantly involved in the application process, and who was included in the application in order to gain female and racial minority preferences. Williams, a Black male, substantially fits the same category of purported controlling person for inclusion in an application. Capital and the limited partners were careful in awarding Williams a 20% ownership interest so as to meet the Commission's minimum standard for a minority's interest as a general partner. *Minority Ownership In Broadcasting*, 92 F.C.C. 2d 849, 855 (1982).

137. In *Pacific TV, Ltd.*, 2 F.C.C. Rcd 1101, 1102-03 (Review Bd 1987), the Review Board refused to honor an integration proposal where, as here, the purported general partner of a limited partnership qualified for a minority preference, was ascertained and invited into the venture by counsel who prepared the application, hired an engineer, and arranged for financing without involvement of the general partner. Legal fees were also paid in that case by a limited partner who was the recipient of the bills. The Commission affirmed the conclusion that there was no *bona fide* partnership, noting that the "acts of the [limited] partner were inconsistent with [the applicant's] integration proposal and that there was no reasonable assurance that the proposal would be carried out." *Pacific TV, Ltd.*, 3 F.C.C. Rcd 1700 (Comm'n 1988). *See also Bradley, Hand & Triplett, supra.*

138. This case is even further aggravated by the role of Capital and its agent Blow who were professional promoters of FM ventures.[23] Capital had secured the contractual rights to perform services for the limited partners through Beattie who negotiated and signed the service contract with Capital on behalf of the limited partners. Williams had absolutely no say or input into the formation, structure and membership of the partnership or the relationship with Capital. Thereafter, the limited partners saw and approved counsel's legal fees before providing the WALO checking account with the necessary funds for payment.

[23] Capital and Blow fit the definition of promoters. Their work began before the organization of the WALO partnership in seeking an opportunity for a venture, projecting a plan for its development, and attracting capital through limited partners. After the venture was set in a legal structure in a form recommended by the promoters (e.g. limited partnership), the promoters secured their continuing control and monetary reward through a service contract. *See Cary, Corporations* (4th Ed.) at 85-86.

That supervisory approval prior to payment was carried out by the limited partners even after the application was filed. The checking account for the venture was physically maintained by the limited partners for three years after the application was filed and Williams had no check signing authority in that account. The WALO checking account was opened as a trial tactic after the case was set for hearing in order to establish an admitted "paper trail." And the services that were performed by Williams were perfunctory and superficial. The budget was a prefabricated model for a Class A FM station which was presented to Williams by counsel and which required little or no original input from Williams. And the public file which he set up was maintained by an unidentified friend.

139. The limited partners, and particularly Beattie, performed services directly and through Capital, their agent, which went beyond the financing of the venture. Those activities of the limited partners, which went beyond the providing of financing for the venture, resulted in their non-passive involvements. *Cf. Magdalene Gunden P'ship*, 6 F.C.C. Rcd 5976 (Review Bd 1991.) For example, the limited partners maintained their own checking account for three years in which Williams had no check writing authority. The checks issued in furtherance of the application, such as filing fees, hearing fees, counsel's fees and Capital's fees were paid by Beattie through that account of the limited partners. And it was Beattie who negotiated and contracted for the services of Capital on behalf of the limited partners. (Paras. 68-71, *supra.*) The letter which Beattie signed is dated March 29, 1988. It precedes the formation of the limited partnership which has an effective date of May 5, 1988, and it was not ratified by Williams. (Terzynski Exh. 4 and WALO Exh. 2.) The offering of comprehensive services by Capital[24] was communicated to Bettie by an earlier letter dated March 9, 1992. (Terzynski Exhs. 4-5.) There is no evidence or finding suggested by WALO that the organized limited partnership which included Williams had adopted the March letter agreement after the partnership was organized by the May Agreement. And all contacts with Capital on and after May 1988, were made by Beattie, not Williams. Beattie's activities in managing the checking account for three years constitute post-filing personal services of a limited partner that the Commission has found to be "the antithesis of a passive investor." *Ownership Attribution Reconsideration*, 1 F.C.C. Rcd 802, 804, Para. 16 (Comm'n 1986). The Commission will attribute those acts of Beattie as the acts of all three limited partners. *Royce International Broadcasting, supra.* Since Capital was operating as agent for only the limited partners under the letter agreement of March 29, 1988, with Blow reporting to Beattie, the acts of Capital also are attributed to the three limited partners. *Id.* The bank letter dated May 3, 1988, which preceded formation of the WALO partnership, was addressed to Beattie, Rasor and McGinnis. (Terzynski Exh. 6.) The bank made no commitment to the WALO partnership with Williams as general partner. Therefore the bank letter provides no assurance and has no relevance as to WALO. And under principles of agency, the services of Capital that were contracted for by the limited partners are attributable to the limited partners. Thus, the limited partners have also violated the Commission's attribution policy through the acts of their agents Capital and Blow.

140. Because of the infirmities of the proposed integration of Williams as a general partner on and after May 5, 1988, the WALO integration proposal will not be credited. And the active participation of the limited partners directly and by attribution on and after May 5, 1988, deny them the purely passive characteristics required to be maintained in order to obtain credit for WALO's integration proposal. *Anax Broadcasting, Inc.*, 87 F.C.C. 2d 483, 488 (Comm'n 1981). *Cf. Magdalene Gunden Partnership, supra* (legal services by limited partner treated the same as any other service relating to a partnership and limited partner's legal services after adoption of applicant's organizational structure are attributable to the applicant). It is concluded that WALO has not shown by a preponderance of the evidence that there is any reasonable assurance that its integration proposal will be carried out. *Bradley, Hand & Triplett, supra. See also Anchor Broadcasting Limited P'ship*, 7 F.C.C. Rcd 4566, 4567 (Comm'n 1992) (Commission will discredit a proposal that it finds to be unreliable or made in bad faith. Therefore, WALO does not qualify for comparative consideration for an award of the construction permit.

Contingent Comparison Conclusions

141. Under the conclusions above, CFCG, HHRP and WALO are found to be basically disqualified and they need not be considered under the Commission's comparative criteria. *See Louis Adelman, aff'd sub nom. Gunan, et al. v. F.C.C., supra.* Terzynski is the only remaining applicant who is basically qualified. (Paras. 90 to 103, *supra.)* Therefore, Terzynski receives the construction permit by default. However, it is appropriate to make a comparative assessment of all applicants for the contingencies of appeals. In making that assessment, there can be no part-time integration credits awarded because there was no evidence offered by the parties showing specific numbers of part-time hours. *Marlin Broadcasting, supra.*

142. CFCG would be the comparative winner if it were basically qualified. CFCG would receive the highest comparative credit for 39 years of residence within the service contour together with the comparatively superior civic activities of Mr. and Mrs. Cherry. (Paras. 20-22, *supra.*) *See Ronald Sorenson*, 6 F.C.C. Rcd 1952 (Comm'n 1991) (local residence and civic activities must be considered together) and *Policy Statement* 1 F.C.C. 2d at 396 (residence in community of license is of primary importance followed by residence within proposed service area). Cherry, Sr. qualifies for an additional credit for his superior broadcast experience. Also, Mr. and Mrs. Cherry each qualifies for a racial minority preference. HHRP would finish second with 21 years of residency within the proposed contour and the comparatively slight civic activities of Hunter. Although HHRP receives no racial preference, the combination of HHRP's 21 years of local residency and creditable civic activities meet the minority preference which WALO

[24] Such services that were offered included: retention of a Washington, D.C. law firm, a consulting engineer and site acquisition specialists. Capital's staff would provide assistance in preparing exhibits, budget cost estimates, a budget based on those estimates, statement of programming, and EEO compliance. Capital would also serve as coordinator of the application process. (Terzynski Exh. 4.)

would receive if Williams is counted as its general partner. *Radio Jonesboro, Inc.*, 100 F.C.C. 2d 941, 948 (Comm'n 1985).

143. WALO would finish third with credit for 7 years of local residence for Williams within the proposed contour, for his promise to move to the city of license, and for his status as a racial minority. However, WALO receives a comparative demerit because it failed to offer reliable proof of a financial ability to provide auxiliary power. Terzynski would finish last.[25] She receives no preference and she has no broadcast experience. Her residence of 13 years in the service area is supplemented with only very slight creditable civic activity since much of her time was spent at charitable functions in demonstrating cooking apparatus which she was in the business of selling. Such activities do not qualify for an offset under *Radio Jonesboro* that would meet WALO's minority preference credit for Williams.

ORDER

Based on the foregoing, IT IS ORDERED that unless an appeal from this *Decision* is taken by a party, or unless the Commission reviews this *Decision* on its own motion,[26] the applications of Central Florida Communications Group, Inc. (File No. BPH-880505MS), Holly Hill Radio Partners (File No. BPH-880519NQ), and WALO Broadcasting Limited Partnership (File No. BPH-880505OZ) ARE DENIED.

IT IS FURTHER ORDERED that the application of Michelle N. Terzynski (File No. BPH-880505PL) for authority to construct a new FM Station on Channel 277A in Holly Hill, Florida IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

[25] While there is evidence to indicate that Terzynski may be interested in selling the station (Para. 95, *supra)* there is no evidence that she intends to sell before the time expires that the Commission has authorized for a subsequent sale. *See Anchor Broadcasting Limited P'ship, supra* (successful applicants in comparative proceedings are only required to hold stations for one year). Therefore, it is found that Terzynski has made a *bona fide* integration proposal.

[26] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. ¶1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JEROME THOMAS LAMPRECHT Middletown, Maryland	**MM DOCKET NO.83-985** File No. BPH-820409AB
DRAGON COMMUNICATIONS, INC. Middletown, Maryland	**MM DOCKET NO. 83-986** File no. BPH-820421AK
BARBARA D. MARMET Middletown, Maryland	**MM DOCKET NO. 83-987** File No. BPH-820908AW

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1992; Released: October 15, 1992

By the Commission:

1. By this Memorandum Opinion and Order, we grant the application filed by Barbara D. Marmet (Marmet) for a construction permit for a new FM station at Middletown, Maryland. In *Jerome Thomas Lamprecht*, 3 FCC Rcd 2527 (1988), the Commission affirmed a Review Board decision, *Jerome Thomas Lamprecht*, 99 FCC 2d 1219 (Rev. Bd. 1984), which granted Marmet's application relying on the enhancement of her integration proposal for gender and local residence and community activities. The court vacated the grant of Marmet's application and remanded this proceeding holding that the policy of awarding comparative credit for female ownership violates the Fifth Amendment. The Commission was directed to resolve the proceeding without considering the gender credit previously awarded to Marmet. *Jerome Thomas Lamprecht* v. *FCC*, 958 F.2d 382 (D.C. Cir. 1992). By Order, *Jerome Thomas Lamprecht*, FCC 92I-22 (Gen. Coun. Apr. 10, 1992), the parties were authorized to file comments on what further action should be taken in light of the court's decision. Comments were filed April 24 1992 by Marmet and by Jerome Thomas Lamprecht (Lamprecht) and May 7, 1992 by Dragon Communications, Inc. (Dragon). Reply Comments were filed May 1, 1992 by Lamprecht and May 6, 1992 by Marmet.

2. The applicants are in accord that this proceeding can be resolved on the basis of the present record. Aside from questions concerning Dragon's standing to participate in the remanded proceeding, the only outstanding area of dispute is the resolution of the comparative issue.

3. *Dragon's Application:* Dragon did not appeal the decision denying its application for review. As a result, the Commission's decision became final with respect to Dragon's application. Although the court of appeals permitted Dragon to intervene in the appellate proceeding, it did not enlarge the scope of the appeal to consider arguments other then those which supported Lamprecht's appeal. *Lamprecht* v. *FCC*, *supra* at 389. Intervention is not a substitute for an appeal. While Dragon was "admitted to the proceeding as it stands . . . [Dragon was properly] not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson* v. *Washington Gas Co.*, 321 U.S. 489, 498 (1944); see also *Illinois Bell Telephone Co.* v. *FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). Thus, Dragon is precluded from arguing issues that were not included in Lamprecht's appeal.

4. Moreover, this case was remanded for the limited purpose of determining which applicant should prevail without considering the gender credit previously awarded to Marmet. *Lamprecht* v. *FCC*, *supra* at 399. The court did not direct the Commission to reconsider any other aspect of the comparative proceeding. Dragon, having failed to appeal the denial of its application in this case, is now precluded from raising its arguments in subsequent proceedings. *Northwestern Indiana Telephone Company, Inc.* v. *FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand"). Thus, the Commission's decision is final with respect to Dragon's application and we need not give further consideration to Dragon's arguments concerning its own qualifications.

5. *The Comparative Issue:* Both Marmet and Lamprecht propose 100 percent integration of ownership and management. Neither applicant has any cognizable mass media interests. Marmet claims that she is entitled to dispositive enhancement credit for local residence and community activities and her auxiliary power proposal. In contrast, Lamprecht is entitled to credit for broadcast experience and his commitment to move to Middletown if his application is granted. Lamprecht asserts that his broadcast experience[1] is sufficient to overcome Marmet's qualitative enhancements, arguing that her principal residence is outside of the service area, that she has been only a part time resident of the service area and that she does not have a record of significant community activities.[2] Lamprecht contends that because the Commission initially relied on gender as a decisionally significant factor, it should prevail in the absence of any gender enhancement. In addition, citing the *Reexamination of the Policy Statement on Comparative*

[1] Lamprecht asserts that the Commission recently proposed using prior broadcast experience as a tie breaker in close cases because "an experienced broadcaster may be more efficient in bringing new service to the public than a novice." *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2668-69 ¶ 36 (1992).

[2] Lamprecht also argues that, because Marmet is independently wealthy and has consistently engaged in personal pursuits as opposed to business pursuits, her life style is inconsistent with -- and she cannot be relied on to effectuate -- her integration proposal. This argument is rejected as being based on speculation and unsupported by precedent. Where an applicant has made an unrebutted pledge to be fully integrated, we will not reject that commitment merely because of a lack of prior work experience. See *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 650 (1983), *rev. den.* FCC 84-161, released April 13, 1984 (subsequent history omitted); *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965).

Broadcast Hearings, 7 FCC Rcd 2664, 2668-69 ¶ 36 (1992), Lamprecht argues that it is entitled to credit for being the applicant who first filed for the Middletown channel.

6. The ALJ ruled that Marmet was entitled to enhancement credit for residence and community activities. 99 FCC 2d 1229, 1234 (ALJ 1984). The Board, finding that Marmet had been at least a part time resident since 1976 and that Lamprecht had no creditable residence, also favored Marmet. 99 FCC 2d at 1225-26.[3]

7. In the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), we held that participation by an individual with pertinent residence "indicates a likelihood of continuing knowledge of changing local interests and needs." We further said that community activities indicating "knowledge of and interest in the welfare of the Community" would be considered as part of a local owner's background. Thus, we look to an integrated owner's length of residence and extent of participation in community activities to determine the strength of the enhancement credit to be awarded.

8. The record concerning Marmet's residence is as follows. In 1976 Marmet bought a house in Urbana, in Frederick County, Maryland, which is within the service area of the proposed station. She restored the house and moved there in 1979. Tr. 91. She votes and pays taxes in Urbana. Tr. 91, 99, 102. The family cars are registered in Urbana and her family spends Christmas there. Tr. 100. In addition she is involved in community activities, including the Frederick County Foundation (concerned with historic preservation), the Frederick County Symphony, the Hospital Auxiliary Board, and Community Commons (concerned with local ecology). Tr. 113, 115, 118 and 119. In spite of this showing, there are other facts which indicate that Marmet spends significant time at her former residence in Bethesda, Maryland. Thus, she still keeps furniture and other possessions in the Bethesda home,[4] her driver's license shows the Bethesda address,[5] the Washington Post newspaper is delivered daily to Bethesda and only on Sunday in Urbana (Tr. 101),[6] and bills are mailed to the Bethesda home. Tr. 138. The overall record, however, supports Marmet's claim that she spends a substantial amount of her time in Urbana and that she is entitled to credit for part-time residence. 99 FCC 2d at 1226.

9. Based on the foregoing facts, we find that Marmet's service area residence and her involvement in community activities, is sufficient to establish a "likelihood of continuing knowledge of changing local interests and needs." *1965 Policy Statement*, 1 FCC 2d at 396. The strength of that enhancement is diminished by the facts indicating that Marmet also spends time in Bethesda.[7] While Marmet has not shown that she has been a full-time resident of Urbana, she does maintain a residence there, and the record shows that she spends a substantial amount of her time in Urbana. This circumstance, combined with her involvement in community activities, provides Marmet with a very slight overall advantage over Lamprecht, who has never lived in the service area. Lamprecht's claim of future residence is accorded less weight than Marmet's existing residence in the service area. *1965 Policy Statement*, 1 FCC 2d *supra* at 396. Lamprecht's slight credit for broadcast experience and Marmet's very slight credit for proposed auxiliary power provide only minor advantages. *1965 Policy Statement, supra; Washington's Christian TV Outreach*, 99 FCC 2d 395, 441-22 (Rev. Bd. 1984). In sum, given the considerably greater significance accorded local residence and community activities, Marmet's very slight advantage for that factor and very slight advantage for auxiliary power outweigh Lamprecht's slight advantage for broadcast experience and are ultimately sufficient to support the grant of her application under the circumstances of this proceeding. *Kennelwood Broadcasting Company, Inc.*, 7 FCC Rcd 520 ¶ 5 (1992); *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 ¶ 2 (1991).[8]

10. Lamprecht's additional argument that it must prevail because the Commission previously relied on an unconstitutional policy is unavailing. While the Commission did previously rely on the gender preference, that factor has been eliminated from consideration, and Lamprecht has failed to assert sufficient facts to warrant the grant of its application in light of Marmet's showing. Finally, Lamprecht seeks to enhance itscomparative position by relying on the proposals in the Commission's *Reexamination of the Policy Statement on Comparative Broadcast Hearings, supra*. These arguments are also unavailing. For the reasons set forth in *Anchor Broadcasting*, 7 FCC Rcd 4566, 4568 ¶ ¶ 18-21 (1992), we conclude that the proposals in the *Reexamination of the Policy Statement* provide no basis for reaching a different conclusion in this proceeding.

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[3] The Board's decision, which was adopted before the Commission's ruling in *Ronald Sorenson*, 6 FCC Rcd 1952 (1991), treated local residence and community activities as separate enhancement factors. In *Sorenson* the Commission held that civic activities and local residence should be treated as a single comparative factor "to determine which applicant has the greater likelihood of knowledge of and interest in the community." 6 FCC Rcd at 1953 ¶ 5. Combining the very slight advantage for local residence and the very slight advantage for civic activities awarded by the Board, its decision can be read as warranting a very slight advantage for Marmet on the overall factor of local residence and civic activities.

[4] The record does not detail the extent to which her personal possessions are divided between Urbana and Bethesda. Tr. 98.

[5] Marmet explained that although she does her grocery shopping in Urbana, she shops for clothing and other items in Washington, D.C. and the Bethesda address makes it easier to cash checks in Washington, D.C. stores. Tr. 99.

[6] Marmet testified that the newsboy leaves the papers behind the bushes and that they pick up the papers when they come into town. Tr. 137.

[7] Citing *Ruarch Associates*, 56 RR 2d 1593, 1596 (Rev. Bd. 1984) and *Thomas C. and Elsie L. Collins*, 93 FCC 2d 467, 470 (Rev. Bd. 1983), Lamprecht argues no credit should be awarded for Marmet's part-time residence. Those cases, however, only support the proposition that applicants should receive reduced credit for part-time local residence, and consistent with those precedents we have reduced the credit awarded Marmet.

[8] In our earlier decision, the comparison of Marmet and Lamprecht was a close one. Nonetheless, when Marmet's female ownership was considered, the result in this case was clear. See 99 FCC 2d at 1240 and 99 FCC 2d at 1228. Now that credit can no longer be given for female ownership, the choice between these two applicants is even closer. Still, after conducting a more exacting examination of the factors favoring each of these applicants, we have concluded that, for the reasons set forth above, Marmet is the preferred applicant under the standard comparative criteria.

11. ACCORDINGLY, IT IS ORDERED, That the application filed by Barbara D. Marmet (File No. BPH-820908AW) IS GRANTED, and that the application filed by Jerome Thomas Lamprecht (File No. BPH-820409AB) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

October 15, 1992

ADVISORY COMMITTEE ON ADVANCED TELEVISION SERVICE IMPLEMENTATION SUBCOMMITTEE MEETING

November 24, 1992
10:00 A.M.
Commission Meeting Room (Room 856)
1919 M Street, N.W.
Washington, D.C.

The agenda for the meeting will consist of:

1. Introduction
2. Minutes of Last Meeting
3. Report of Working Party 1
   Policy and Regulation
4. Report of Working Party 2
   Transition Scenarios
5. Review of Final Report Submissions
6. Future of Implementation Subcommittee
7. General Discussion
8. Other Business
9. Adjournment

All interested persons are invited to attend. Those interested also may submit written statements at the meeting. Oral statements and discussion will be permitted under the direction of the Implementation Subcommittee Chairs.

Any questions regarding this meeting should be directed to George Vradenburg III at (310) 203-1334, Dr. James J. Tietjen at (609) 734-2237, or Gina Harrison at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Companies — Transmittal No. 2225

Revisions to Tariff F.C.C. No. 73

ORDER

Adopted: October 15, 1992; Released: October 16, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On September 2, 1992, the Southwestern Bell Telephone Company (Southwestern Bell) filed Transmittal No. 2225, to establish a nonchargeable option it calls 64 Clear Channel Capability (64 CCC), to be available with Feature Group D trunks, or Basic Serving Arrangement D (BSA-D), with Signalling System 7 (SS7) out of band signalling. The 64 CCC Option would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a digital trunk channel. Southwestern Bell Description and Justification (D&J) at 1-1 to 1-2. Initially, Southwestern Bell expects this option to be used by interexchange carriers (IXCs) to establish interLATA calls between Integrated Services Digital Network (ISDN) end users. *Id.* Southwestern Bell's 64 CCC option also provides the customer with Access Transport Parameter (ATP), which provides additional signalling information. *Id.* at 1-3. Southwestern Bell intends to assess its existing trunk conversion nonrecurring charge (NRC) when a customer adds 64 CCC to an existing service. Customers ordering a new Feature Group D trunk or BSA-D service would be charged the existing Feature Group D trunk or BSA-D installation charge. Transmittal 2225 is scheduled to take effect on October 17, 1992.

2. On September 17, 1992, MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal 2225. MCI claims that Transmittal 2225 does not permit "equal access" to the ISDN D-channel. MCI Petition at 2-3. MCI maintains that it is unclear whether Southwestern Bell will adhere to American Network Standards Institute (ANSI) standards, which are developed in industry fora rather than unilaterally dictated by Bell Communications Research or Southwestern Bell. MCI requests that the Bureau require Southwestern Bell to refer to technical publications which specify ANSI standards. *Id.* at 3-4. According to MCI, one of the technical publications cited by Southwestern Bell precludes the inclusion of Access Transport Parameter (ATP) in what it calls "backwards SS7 messages" (*i.e.*, the Address Complete Message and the Answer Message). *Id.* at 3. MCI criticizes the lack of discussion regarding maintenance of the lines used to provide 64 CCC service in the technical publications which are available. *Id.* at 4. Finally, MCI notes that NYNEX plans to offer 64 CCC service conversion free of charge, and criticizes Southwestern Bell for planning to impose a nonrecurring charge for 64 CCC installation. MCI argues that it is especially unreasonable for Southwestern Bell to impose the same installation charge for adding 64 CCC service to an SS7-equipped trunk as it does when a customer orders SS7 interconnection and 64 CCC service for a non-SS7-equipped trunk. *Id.* at 4-5.

3. Southwestern Bell filed its reply on September 28, 1992. Southwestern Bell believes MCI's equal access argument is misplaced because the ISDN D-channel is part of a lineside local exchange service and unrelated to 64 CCC. Southwestern Bell Reply at 2-3. Southwestern Bell asserts it complies with ANSI interconnection standards. Southwestern Bell also maintains that one of the technical publications cited by MCI is unrelated to 64 CCC service. *Id.* at 3-4. Southwestern Bell further claims that no other carriers are providing "backwards" ATP, and claims it will offer this capability when it is included in future Bellcore technical references. *Id.* at 4. Southwestern Bell denies that its technical publications do not provide performance and maintenance specifications for 64 CCC facilities. *Id.*

4. The Common Carrier Bureau has reviewed Southwestern Bell's Transmittal 2225 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications, Inc., against Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Transmittal No. 2225, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Revisions to Tariff
F.C.C. No. 2

Transmittal No. 650

ORDER

Adopted: October 13, 1992; Released: October 14, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 20, 1992, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 650, to establish a nonchargeable option it calls 64 Clear Channel Capability (64 CCC). The 64 CCC Option would be available with Feature Group D trunks with SS7 out of band signalling and would allow customers to use the full 64 kilobit per second (kbps) bandwidth of a digital trunk channel. Ameritech Description and Justification (D&J) at 1. Initially, Ameritech expects this option to be used by interexchange carriers (IXCs) to establish interLATA calls between Integrated Services Digital Network (ISDN) end users. *Id.* Ameritech plans to apply existing nonrecurring charges when customers order 64 CCC or add 64 CCC to an existing service. *Id.* at 2. Transmittal 650 is scheduled to take effect on October 19, 1992.

2. On September 4, 1992, MCI Telecommunications Corp. (MCI) filed a petition to reject or suspend and investigate Transmittal 650. MCI opposes Ameritech's nonrecurring charges for this service, arguing that Ameritech recovers all costs associated with option changes, rearrangements, and testing through recurring Local Transport charges. MCI Petition at 2. MCI claims that Transmittal 650 is not clear on whether interexchange carriers (IXCs) will be able to offer services to end users over the ISDN D-channel, and maintains that a limitation on IXC access to the D-channel would place IXCs at a competitive disadvantage relative to the BOCs. *Id.* at 2-3. MCI criticizes Ameritech for referring to Ameritech or Bellcore technical publications in its tariff, and suggests that the Bureau require these BOCs to adhere to American Network Standards Institute (ANSI) technical publications. MCI states that it prefers ANSI publications because they establish standards which are developed in industry fora rather than unilaterally dictated by Bellcore. *Id.* at 3. In addition, MCI criticizes the lack of discussion regarding maintenance of the lines used to provide 64 CCC service in the technical publications which are available. *Id.* at 4. Finally, MCI asserts that some of the technical publications referenced are not readily available. *Id.*

3. On September 17, 1992, Ameritech filed a reply. Ameritech answers that its nonrecurring charge for 64 CCC service is appropriate. Ameritech maintains that, while there are no recurring costs associated with 64 CCC, there are one-time costs associated with converting trunks to 64 CCC. Ameritech Reply at 2. Ameritech further maintains that the D-channel is part of the local network and not involved in access service, but that it will deliver signalling and administrative data from the D-channel to the access customer. *Id.* Ameritech claims that one of the technical publications cited by MCI as being unavailable is not associated with 64 CCC, and that the other one would be made available as soon as possible.[1] *Id.* at 3. In response to MCI's technical standards argument, Ameritech replies that it will comport in all respects with industry standards. Ameritech indicates that the reason it is issuing its own technical publication is not to evade ANSI standards but to supplement and amplify them with additional detail, options, and clarifications. *Id.* at 3-4.

4. The Common Carrier Bureau has reviewed Ameritech's Transmittal 650 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petition for rejection or suspension and investigation filed by MCI Telecommunications, Inc., against Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 650, IS DENIED.

6. IT IS FURTHER ORDERED that the Ameritech Operating Companies may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective date of Transmittal No. 650. For these purposes, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 92-713.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] This technical publication has since been made available to MCI. *See* Letter from Michael B. Suthers, Ameritech, to Chief, Tariff Division, Sept. 22, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

Petition for Reconsideration
and/or Clarification of

Jones Eastern of the
Outer Banks, Inc.
Licensee, Radio Station WRSF(FM)
Columbia, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: September 3, 1992; Released: October 14, 1992

By the Commission:

1. The Commission has under consideration a "Petition for Reconsideration and/or Clarification," filed by Jones Eastern of the Outer Banks, Inc. ("Jones Eastern"), licensee of WRSF(FM), Columbia, North Carolina. Jones Eastern seeks reconsideration of the Commission's decision in *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), in which we found that the licensee was not in compliance with the main studio rule, 47 C.F.R. § 73.1125, because it had failed to maintain a "meaningful management and staff presence" at its main studio, as required by *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd 5024 (1988). We ordered Jones Eastern to take steps to bring its main studio into compliance with the rule, and to inform us of those steps within 30 days of our decision. Jones Eastern submits this petition, but does not submit a progress report. For the reasons discussed herein, we deny reconsideration, but grant clarification.

2. In 1989, the Mass Media Bureau denied Jones Eastern's modification request to relocate its main studio outside its principal community contour and 51 miles away from its city of license, Columbia, (population 836), to the larger beachfront community of Nags Head, (permanent population 1,838, estimated seasonal population 32,000-35,000 for summer, 10-15,000 for fall),[1] the location of its auxiliary studio. The Bureau ruled that Jones Eastern had failed to show that granting a modification would serve the public interest better than adhering to the main studio rule. According to a subsequent complaint filed with the Bureau in 1989, Jones Eastern was apparently operating its "main studio" from Nags Head, despite the Bureau's denial of its modification request. Upon investigation, the Bureau discovered that the purported "main studio" in Columbia was staffed by only a full-time office worker who took telephone calls and conducted a telephone survey of Columbia residents. A business manager and the general manager spent four and two unspecified hours per week, respectively, at the studio. The Bureau found that this arrangement did not constitute a "main studio" and directed Jones Eastern to take steps to assure a "meaningful management and staff presence" and to submit a progress report.

3. Jones Eastern filed an application for review, challenging the Bureau's determination that its studio did not meet the staffing standard. In *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991), we affirmed the Bureau, ruling that the occasional oversight of the managers did not constitute a meaningful presence. We stated that "a main studio must, at a minimum, maintain full-time managerial and full-time staff personnel." 6 FCC Rcd at 3616. We added that licensees need not have the same staff person and manager at the studio, as long as there is management and staff presence during normal business hours. *Id.* at n.2.

4. Jones Eastern now requests that the Commission reconsider its decision on the basis of Jones Eastern's new staffing proposal, which consists of: 1) a full-time office worker; and 2) a full-time chief engineer, who will also act as the station's news director during morning and afternoon drive time hours (5:30 a.m -9:30 a.m. and 3:30 p.m.-6:30 p.m. Monday through Friday), the hours when news operations originate from Columbia.[2] According to Jones Eastern, various account executives and the station manager (who supervises the sales department) would also work at Columbia several days a week. In addition Jones Eastern requests clarification on the following two points:

> a) What types of managerial personnel will serve to satisfy the required full-time "management presence," *e.g.*, is a chief engineer considered management for purposes of the main studio rule?
>
> b) Must the management and staff personnel be *physically present* at the main studio on a full-time basis, or may they simply report to work and be based at that studio?

Jones Eastern advocates an interpretation that would allow management or staff personnel that report to work at the main studio location to be absent from the office on station-related activities, such as meetings with community leaders, sales calls, newsgathering, and field work on the station transmitter.

5. The National Association of Broadcasters (NAB) filed comments in support of Jones Eastern's petition for reconsideration and/or request for clarification (but not addressing the specific enforcement proceeding against Jones Eastern).[3] NAB supports Jones Eastern's new staffing proposal, and requests that the Commission reconsider the "two-person full-time" requirement and adopt a less rigid approach.[4] NAB argues that requiring two people at the main studio on a full-time basis would create a hardship

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[1] Permanent population figures are from the U.S. Census Bureau's 1990 statistics; Nags Head's estimated seasonal population figures are from Nags Head's Department of Planning and Development.

[2] Jones Eastern points out that the chief engineer would also act as a staff-level employee by answering telephones, receiving visitors, and/or operating technical equipment in the event of an emergency or a late-breaking news story.

[3] Although our Rules do not contemplate such a petition, we will consider the NAB's suggestions to the extent that they may help clarify the issues.

[4] We reiterate that the standard does not necessarily require two people at the main studio. Rather, it requires management and staff presence on a full-time basis, which may consist of more than two people working on part-time bases. *See Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd at 3616 n.2.

for the large number of radio stations with four or fewer full-time employees, because it would restrict the number of employees who could be in the field selling advertising time, gathering local news or interacting with community leaders and local citizens. In this regard, NAB points out, the standard would not achieve the local service goals articulated in *Main Studio and Program Origination Rules (Clarification)*, 3 FCC Rcd at 5026. NAB also postulates that the standard would negate any cost savings from which stations in financial difficulty might otherwise benefit in reducing full-time staff.[5]

6. Specifically, NAB proposes that we adopt a standard requiring a management-level person to be based at the main studio, but not required to be present at that location at all times. NAB also proposes that we consider any person who qualifies to be listed in the "top four" job categories on the Annual Employment Report (FCC Form 395-B) as a management-level person for purposes of the main studio rule. NAB also urges the Commission to allow the staff-level person to engage in activities unrelated to the station operations, such as serving as a receptionist for another local business.

7. WOBR, Inc., licensee of radio stations WOBR(AM) and WOBR-FM, which compete directly with station WRSF, filed comments in opposition to WRSF's petition for reconsideration and/or clarification. WOBR argues that Jones Eastern's petition is an attempt to legitimize its illegal operation, which it has perpetuated since 1987. WOBR points out that WRSF is not some "Mom and Pop" station with only a few employees, but rather, a 20-employee[6] station owned by a group operator.[7] WOBR agrees with the NAB's position urging the Commission not to adopt a rigid approach to main studio interpretation. Rather, WOBR advocates an ad hoc approach, which would differentiate between 20-employee stations (with only two at the main studio) and extensively time-brokered stations (with only two employees overall). WOBR also urges the Commission to deny Jones Eastern's petition as it contains no newly discovered information.

8. WOBR also charges that Jones Eastern has made a misrepresentation regarding the residency of its managers. According to WOBR, WRSF's senior account executive, Roger Scheel, whom Jones Eastern represents in its petition as a Columbia resident, left WRSF in mid-May 1991, two months before Jones Eastern filed the instant petition. WOBR also raised this misrepresentation issue in a petition to deny an application to transfer control of WRSF (file no. BTCH-910808HF), filed by C.J. Jones on August 8, 1991. The staff has disposed of this allegation in its dismissal of the transfer of control application.[8] *See Letter to Martin R. Leader and Mark J. Prak* (Chief, Audio Services Division, April 30, 1992)(staff finding of no intentional misrepresentation or attempt to wilfully mislead the Commission by WRSF).

9. First, we find that Jones Eastern's current proposal would meet the requirements for a "meaningful management and staff presence" at its main studio. The Commission has considered chief engineers "managerial" in a number of different contexts. For example, in determining diversification of control in comparative hearings, chief engineers have been considered managerial when it is shown that they perform managerial functions. *See, e.g., Talleyrand Broadcasting*, 103 FCC 2d 476 (Rev. Bd. 1985)(chief engineer not attributable albeit managerial). This principle is equally applicable to integration of ownership and management proposals in such hearings. *See, e.g., Cleveland Television Corporation*, 91 FCC 2d 1148, 1164 (I.D. 1982)(chief engineer/program and operations manager is managerial for integration purposes), *aff'd*, 91 FCC 2d 1129 (Rev. Bd. 1982); *rev. denied*, FCC 83-235, *aff'd, Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984). *See also Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1990 (Rev. Bd. 1987)(Review Board reference to chief engineer as "key managerial position"). For EEO reporting purposes, the Commission considers chief engineers in the "officials and managers" section of the Annual Employment Report (*see* Instructions to FCC Form 395-B, para 7(a)).

10. Here, Jones Eastern envisions its chief engineer doubling as the station's news director during certain dayparts. This proposal is consistent with our overall view that a chief engineer with managerial duties is "managerial." We have, however, recognized previously that chief engineers, though considered "key employees" for cross-interest purposes, generally do not make decisions regarding the policy, programming, or business planning of a licensee. *Reexamination of the Commission's Cross-Interest Policy (Further Notice of Inquiry/Notice of Proposed Rulemaking)*, 4 FCC Rcd 2035 n.4 (1989). *See also Reexamination of the Commission's Cross-Interest Policy (Notice of Inquiry)*, 2 FCC Rcd 3699 (1987). Thus, if Jones Eastern's proposal had not included the additional news director duties, we would have required the licensee to show that the chief engineer is authorized to make typical managerial decisions pertaining to facilities, equipment, programming, sales, and emergency procedures.

11. With respect to the specific questions posed by both Jones Eastern and the NAB, we believe that the following categories of positions would constitute a "meaningful managerial presence" at the main studio: President or other corporate officer, general manager, station manager, program director, sales manager, chief engineer with managerial duties, news director, personnel manager, facili-

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[5] NAB also requests that the Commission stay its enforcement of the standard pending the completion of this reconsideration proceeding, on the basis that the standard is too stringent. In light of our action herein, NAB's request is dismissed as moot.

[6] WOBR took this figure from WRSF's 1990 Annual Employment Report. WRSF's 1991 Annual Employment Report shows 18 employees (14 full-time, four part- time).

[7] Commission records show that, in addition to WRSF, Jones Eastern's principal, C.J. Jones, owns a controlling interest in the following radio stations: WVBS(AM) and WVBS-FM, Burgaw, North Carolina; WUJM(AM) and WUJM-FM, Goose Creek, South Carolina; and WYAK(AM) and WYAK-FM, Surfside Beach, South Carolina.

[8] WOBR also points out that the location of WRSF's Emergency Broadcast System (EBS) equipment at its auxiliary, rather than main, studio wreaked havoc when Hurricane Bob caused the Nags Head personnel to evacuate and relocate to Columbia. As a result, WOBR states, WRSF could not broadcast EBS activations intended to warn residents, nor could other monitoring stations pick up those warnings from the station. The EBS rules, however, do not prohibit stations from locating their EBS equipment at auxiliary studios. *See* 47 C.F.R. § 73.901 *et. seq.*

ties manager, operations manager, production manager, promotion director, research director, controller, and chief accountant.[9] These categories incorporate both the EEO "officials and managers"[10] and cross-interest "key employees" concepts. Because some of these positions may require the persons occupying them to conduct significant business outside the office, we would not, of course, require management personnel to remain "chained to their desks" during normal business hours. Rather, we require that management personnel report to work at the main studio on a daily basis, spend a substantial amount of time there and, unlike Jones Eastern's "ghost management," use the studio as a "home base."[11] Ultimately, that management presence must remain responsible for whatever station operations occur from that studio. To the extent that the staff person may fully perform its station functions with time to spare, and coverage of the main studio permits, that person may also take on responsibilities for another business, as long as the main studio remains attended during normal business hours.

12. Although we now accept Jones Eastern's new staffing proposal, its petition for reconsideration does not "rel[y] on facts which have occurred or circumstances which have changed" since the denial of its application for review under § 1.106(b)(2)(i). Petitioner's decision to assign a management person to the main studio represents neither a "newly discovered fact" nor a "changed circumstance," but is merely a new proposal. *See Practice and Procedure*, 46 RR 2d 524, 526 n.5 (1979). For this reason, we are granting the petition for clarification and denying the petition for reconsideration. Moreover, Jones Eastern's filing of this petition does not, nor has Jones Eastern shown good cause as to why it should, stay the effectiveness of the Commission's order. *See* § 1.106(n). Jones Eastern's exercise of available administrative remedies upon the Mass Media Bureau's 1989 directive does not ameliorate the two-year period that WRSF remained in violation of the main studio rule. Accordingly, we are adopting a Notice of Apparent Liability for WRSF's continuing main studio violation.

13. Accordingly, IT IS ORDERED that, pursuant to Section 1.106(j), of the Commission's Rules, the Petition for Reconsideration and/or Clarification is denied in part and granted in part. Jones Eastern is hereby ordered to implement its staffing proposal within thirty (30) days of the date of this opinion.

14. IT IS FURTHER ORDERED that the NAB's request for stay is dismissed as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[9] In this regard, we have stated that our emphasis is on job duties, rather than job titles. *See Arkansas Educational Television Commission*, 3 FCC Rcd 1923, 1924 (1988).

[10] We reject as overbroad NAB's suggestion that we use the "top four" EEO categories to define managers for this purpose, as those categories include non-managerial employees.

[11] We are fully aware, as NAB demonstrates, that a significant body of stations have only a limited number of employees. For example, 5.8% (approximately 640) of all radio stations are said to have two or fewer employees, while 18.7% (approximately 2060) have four or fewer. Unlike WRSF, stations of this size will generally not have more than one studio. In such circumstances, where the employees report to the main studio, we have no intention of limiting their ability to leave the studio to conduct station business.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-230

In the Matter of

Amendment of Section 73.202(b), RM-8090
Table of Allotments,
FM Broadcast Stations.
(Snow Hill, Maryland)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1992; Released: October 23, 1992

Comment Date: December 14, 1992
Reply Comment Date: December 29, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Snow Hill Community Broadcasting requesting the allotment of Channel 223A to Snow Hill, Maryland, as the community's first local service.[1]

2. We believe that the public interest would be served by proposing the allotment of Channel 223A to Snow Hill as the community's first local service. Channel 223A is available for allotment to Snow Hill with a site restriction of 11.3 kilometers (7.0 miles) east of the community.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No.
Snow Hill, Maryland	223A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 14, 1992,** and reply comments on or before **December 29, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Avram Schachter
Snow Hill Community Broadcasting
251 Rollins Ave.
Rockville, MD 20852

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Victoria M. McCauley, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] Snow Hill Community Broadcasting originally requested the allotment of Channel 243A to Snow Hill. The allotment of Channel 243A to Snow Hill was mutually exclusive with the allotment of Channel 243B at Williamsburg, Virginia, and dependent on the reallotment of that channel at another community. A Commission engineering analysis indicates that another channel is available for allotment at Snow Hill. Therefore, we will resolve this matter as an independent proceeding.

[2] Channel 223A can be allotted at Snow Hill at coordinates 38-04-44 and 75-25-51.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-227

In the Matter of

Amendment of Section 73.202(b),	RM-8070
Table of Allotments,	RM-8072
FM Broadcast Stations.	
(Eatonton, Fayetteville,	
Greenville, Griffin,	
Hogansville, Sparta and	
Thomaston, Georgia,	
and Ashland, Alabama)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 24, 1992; Released: October 23, 1992

Comment Date: December 14, 1992
Reply Comment Date: December 29, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration two separately filed, conflicting petitions for rule making. The first petition, filed by Orchon Broadcasting Company ("Orchon"), requests the substitution of Channel 239C3 for Channel 239A at Greenville, Georgia, and the modification of its construction permit for Station WEJG(FM) to specify operation on the higher class channel (RM-8070). The second petition was filed by Good Medicine Radio, Georgia, Inc. ("GMR"), licensee of Station WSKS(FM), Channel 249A, Sparta, Georgia, and Design Media, Inc. ("DMI"), licensee of Station WQUL(FM), Channel 249A, Griffin, Georgia (jointly referred to as "petitioners"). Petitioners propose the substitution of Channel 249C3 for Channel 249A at Sparta and the reallotment of the channel to Eatonton, Georgia; the substitution of Channel 248C3 for Channel 249A at Griffin and the reallotment of the channel to Fayetteville, Georgia, and the modification of the licenses of Stations WSKS(FM) and WQUL(FM) to specify Eatonton and Fayetteville, respectively as their communities of license. In order to accommodate these proposals, petitioners also request the substitution of Channel 239A for Channel 248A at Hogansville, Georgia, and the modification of Station WEIZ(FM)'s construction permit to specify Channel 239A; the substitution of Channel 237A for Channel 239A at Greenville, Georgia, and the modification of Station WEJG(FM)'s construction permit to specify Channel 237A; the substitution of Channel 266A for Channel 237A at Thomaston, Georgia, and the modification of Station WTGA(FM)'s license to specify Channel 266A; and the substitution of Channel 238A for Channel 237A at Ashland, Alabama, and the modification of Station WASZ(FM)'s license to specify Channel 238A (RM-8072). Orchon and petitioners each state an intention to apply for the respective channel, if allotted. Orchon's proposal to substitute Channel 239C3 for Channel 239A at Greenville and petitioner's proposal to substitute Channel 237A for Channel 239A at Greenville are mutually exclusive.

2. GMR and DMI seek to invoke the provisions of Section 1.420(i) of the Commission's Rules. GMR states that the use of Channel 249A at Sparta and Channel 249C3 at Eatonton is mutually exclusive. GMR notes that the reallotment of the channel from Sparta (population 1,710)[1] to Eatonton (population 4,737) will provide Eatonton with its first full-time local transmission service, while Sparta will continue to be served by Station WHAN(FM).[2] GMR states that Eatonton is an incorporated city with a mayor, city council, volunteer fire department, numerous businesses, financial institutions and residential areas in the city. Eatonton has a variety of civic organizations such as a Lions Club, Mason Lodge and Elks Club. The city provides its own police protection and has its own post office. GMR claims that the requested reallotment and upgrade of Station WSKS(FM) at Eatonton will serve 83,989 persons in 4,759.5 square kilometers, which represents an increase of 55,466 persons and 2,929.6 square kilometers over the present facility.

3. DMI notes that the use of Channel 249A at Griffin and Channel 248C3 at Fayetteville is mutually exclusive. DMI argues that the reallotment of the channel from Griffin (population 21,347) to Fayetteville (population 5,827) will provide Fayetteville with its first local transmission service, while Griffin will continue to receive service from Stations WHIE(AM) and WKEU(AM). DMI states that neither community is located within an Urbanized area. DMI states that Fayetteville is an incorporated city with a mayor city, post office, banks and numerous businesses. The city provides its own fire and police services, separate from county services. DMI claims the requested reallotment and upgrade of Station WQUL at Fayetteville will serve 867,736 persons in 4,782.3 square kilometers, which is an increase of 744,796 persons and 2,445.4 square kilometers over the present facility.

4. In further support of their proposal, petitioners claim that the proposed Class A channel substitutions will enable the Hogansville and Thomaston stations to operate as 6 kilowatt facilities. Specifically, petitioners maintain that Station WEIZ, Hogansville, Georgia, will be able to serve 68,589 persons in 2,497.8 square kilometers, an increase of 9,113 persons and 670.6 square kilometers over its present facility. Station WASZ, Thomaston, Georgia, will be able to serve 20,376 persons in 2,275.3 square kilometers, which represents an increase of 7,108 persons in 612 kilometers over its present facility.

5. An engineering analysis has confirmed that all aspects of both proposals comply with the Commission's minimum distance separation requirements. Channel 239C3 can be allotted to Greenville with a site restriction 13.8 kilometers (8.6 miles) west of the community. Conversely, Channel 237A can be substituted for Channel 239A at Greenville at the construction permit site.[3] Channel 249C3

[1] Population figures are taken from the 1990 U.S. Census.
[2] Station WKVQ(AM), a daytime-only station, is licensed to Eatonton.
[3] The coordinates for Channel 239C3 at Greenville are North

can be reallotted to Eatonton with a site restriction of 8.6 kilometers (5.4 miles) northeast of the community,[4] in order to avoid a short-spacing to Station WFOX(FM), Channel 246C, Gainesville, Georgia, and to avoid a short-spacing to a construction permit for Station WKXK(FM), Channel 250C3, Fort Valley, Georgia. Channel 248C3 can be reallotted to Fayetteville with a site restriction of 2.7 kilometers (1.7 miles) southwest,[5] in order to avoid a short-spacing to Station WFOX(FM), Channel 246C, Gainesville, Georgia. Channel 239A can be allotted to Hogansville in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.5 kilometers (7.1 miles) southwest,[6] in order to avoid a short-spacing to Station WKLS, Channel 241C, Atlanta, Georgia. Channel 266A can be allotted to Thomaston in compliance with the Commission's minimum distance separation requirements with a site restriction 5.7 kilometers (3.5 miles) west,[7] in order to avoid a short-spacing to Station WPGA(FM), Channel 265A, Perry, Georgia, and Station WCJM(FM), Channel 265A, West Point, Georgia. Channel 238A can be allotted to Ashland in compliance with the Commission's minimum distance separation requirements at its currently licensed site.[8]

6. We believe the public interest would be served by seeking comments on these proposals. In order to make a determination as to which proposal would better serve the public interest, we shall provide the proponents an opportunity to demonstrate in comments why their respective proposals should be preferred. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) first fulltime aural service;
(2) second fulltime aural service;
(3) first local service;
(4) Other public interest matters;
[Co-equal weight is given to priorities (2) and (3)].

Additionally, Orchon should submit a gain area study showing the population and square kilometers of the increased area to be served by its proposal. *See Greenup, Kentucky, and Athens, Ohio*, 6 FCC Rcd 1493 (1991), for the methodology to be applied to the studies.

7. We shall propose to modify the license of Station WEJG(FM), Greenville, to specify operation on Channel 239C3, in accordance with Section 1.420(g) of the Commission's Rules, without entertaining other expressions of interest or requiring the party to demonstrate the availability of an additional equivalent channel for use by any such interested parties. Alternatively, we shall propose to modify the license of Station WSKS(FM), Sparta, and Station WQUL(FM), Griffin, to specify operation on Channel 249C3 at Eatonton and Channel 248C3 at Fayetteville, respectively. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of the channels or require the petitioner's to demonstrate the availability of an additional equivalent class channel for use by such parties.

8. In recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter site, GMR and DMI have provided copies of agreements with T. Wood and Associates, Inc., permittee for Station WEIZ(FM) and WTGA, Radio Georgia, Inc., licensee of Station WTGA(FM) consenting to a change in their authorized transmitter sites, as well as the proposed change in channels of operation, to accommodate the modification of Stations WSKS(FM) and WQUL(FM). GMR and DMI has stated their willingness to reimburse the permittee of Station WEIZ(FM) and the licensee of WTGA(FM) for reasonable expenses incurred in relocating to Channel 239A and Channel 266A respectively.

9. We are also issuing *Show Cause Orders* to Orchon, the permittee of Station WEJG(FM), Greenville, and Perry Communications, Inc., licensee of Station WASZ, Ashland, seeking comments as to why each authorization should not be modified to specify operation on Channel 237A and Channel 238A, respectively. Whenever an existing licensee or permittee is ordered to switch channels in order to accommodate a new allotment, we require the proponent of the new allotment to make a commitment that it will reimburse the licensee or permittee for reasonable and prudent expenses incurred by the change of channels. GMR and DMI has indicated its willingness to reimburse the permittee of Station WEJG(FM) for the reasonable and prudent costs of changing frequency. In addition, GMR and DMI are requested to state in comments their intentions of reimbursing the licensee of Station WASZ(FM), Ashland, Alabama, for the reasonable cost of changing its frequency at Ashland.

10. Although an *Order to Show Cause* to T. Wood and Associates, Inc., and WTGA, Radio Georgia, Inc., is not required in view of their agreement and consent to GMR and DMI modification request, we will serve them with a copy of this *Notice*.

11. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

Latitude 33-01-39 and West Longitude 84-51-39. The coordinates for Channel 237A at Greenville are North Latitude 32-54-00 and West Longitude 84-46-54.

[4] The coordinates for Channel 249C3 at Eatonton are North Latitude 33-23-03 and West Longitude 83-19-22.

[5] The coordinates for Channel 248C3 at Fayetteville are North Latitude 33-25-42 and West Longitude 84-28-22. We note the possibility of interference to the FCC Monitoring Station at Powder Springs, Georgia. Therefore, if Channel 248C3 is reallotted to Fayetteville, Georgia, the licensee will be required to provide protection to the monitoring station.

[6] The coordinates for Channel 239A at Hogansville are North Latitude 33-06-18 and West Longitude 85-00-27.

[7] The coordinates for Channel 266A at Thomaston are North Latitude 32-54-08 and West Longitude 84-23-13.

[8] The coordinates for Channel 238A at Ashland are North Latitude 33-18-30 and West Longitude 85-50-58.

City	Channel No. Present	Proposed
OPTION I		
Greenville, Georgia	239A	239C3
OPTION II		
Ashland, Alabama	237A	238A
Eatonton, Georgia	--	249C3
Fayetteville, Georgia	--	248C3
Greenville, Georgia	239A	237A
Griffin, Georgia	249A	--
Hogansville, Georgia	248A	239A
Sparta, Georgia	249A, 274A	274A
Thomaston, Georgia	237A	266A

12. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Orchon Broadcasting Company, Inc., permittee of Station WEJG(FM), Channel 239A, Greenville, Georgia, SHALL SHOW CAUSE why its permit should not be modified to specify operation on Channel 237A in lieu of Channel 239A and Perry Communications, Inc., licensee of Station WASZ(FM), Channel 237A, Ashland, Alabama, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 266A in lieu of Channel 237A.

13. Pursuant to Section 1.87 of the Commission's Rules, Orchon Broadcasting Company, Inc., and Perry Communications, Inc., may, not later than **December 14, 1992,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Orchon Broadcasting Company, Inc., or Perry Communications Inc., to furnish additional information. If Orchon Broadcasting Company, Inc. or Perry Communications, Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Orchon Broadcasting Company, Inc., or Perry Communications, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

14. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Radio Georgia, Inc.
Station WTGA(FM)
208 S. Center St.
Thomaston, GA 30286

T. Wood and
Associates, Inc.
Station WEIZ(FM)
Box 1114
LaGrange, GA 30240

WASZ
Box 395
Ashland, AL 36251

Orchon Broadcasting
Company, Inc.
219 Stonehaven Drive
Newnan, GA 30265

15. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

16. Interested parties may file comments on or before **December 14, 1992,** and reply comments on or before **December 29, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan J. Alpert
1250 Connecticut
Ave., N.W.
7th Floor
Washington, D.C. 20036
(Counsel for Good
Medicine Radio,
Georgia, Inc. and
Design Media, Inc.)

Robert S. Stone
McCampbell &
Young, P.C.
2021 Plaza Tower
Post Office Box 550
Knoxville,
Tennessee 37901-0550
(Attorney for
Orchon Broadcasting
Company, Inc.)

17. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

18. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-232

In the Matter of

Amendment of Section 73.202(b), RM-8077
Table of Allotments,
FM Broadcast Stations.
(Monticello, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1992; Released: October 23, 1992

Comment Date: December 14, 1992
Reply Comment Date: December 29, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Mayflower Broadcasting Corporation ("petitioner") requesting the substitution of Channel 270C3 for Channel 270A at Monticello, Florida, and the modification of Station WJPH(FM)'s license to specify operation on the higher class channel.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 270C3 for Channel 270A at Monticello since it could provoide the community with a wide coverage area FM service. Channel 270C3 can be allotted to Monticello in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.0 kilometers (11.2 miles) south, in order to accommodate petitioner's desired transmitter site.[2] As requested, we also propose to modify Station WJPH(FM)'s license to specify Channel 270C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 270C3 at Monticello or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Monticello, Florida	270A	270C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 14, 1992,** and reply comments on or before **December 29, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard D. Davidson, President
Mayflower Broadcasting Corporation
6155 N. Kirkwood
Chicago, IL 60646

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party nor represented by counsel shall be signed an verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. See also amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3910, n.41 (1990). Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 270C3 at Monticello are North Latitude 30-22-56 and West Longitude 83-53-26.

on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-226

In the Matter of

Amendment of Section 73.202(b), RM-8082
Table of Allotments,
FM Broadcast Stations.
(Seminole, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 24, 1992; Released: October 23, 1992

Comment Date: December 14, 1992
Reply Comment Date: December 29, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by One Ten Broadcast Group, Inc. ("petitioner"), requesting the substitution of Channel 290A for Channel 288A at Seminole, Oklahoma, and the modification of Station KIRC's license to specify operation on the alternate Class A channel. Petitioner states that it will apply for the channel, if allotted.

2. Petitioner submits that Station KIRC, operating on its present channel, is precluded from improving the station's operating power to 6 kW because of short-spacings to Station KKND, Channel 288A, Stillwater, Oklahoma, and Station KXXK, Channel 288A, Chickasha, Oklahoma. However, an improvement of the station's facilities to 6 kW is possible if Channel 290A is substituted for Channel 288A.

3. We believe the public interest would be served by proposing the substitution of Channel 290A for Channel 288A at Seminole, Oklahoma, since it could enable Station KIRC to operate with full Class A power of 6 kW and expand its coverage area. Channel 290A can be allotted to Seminole in compliance with the Commission's minimum distance separation requirements at the station's licensed site.[1] As requested, we also propose to modify Station KIRC's license to specify Channel 290A in lieu of its present Channel 288A. We will not accept competing expressions of interest in this equivalent channel substitution.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Seminole, Oklahoma	288A	290A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 14, 1992,** and reply comments on or before **December 29, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Herman L. Jones, President
One Ten Broadcast Group, Inc.
120 E. Main Street
Shawnee, Oklahoma 74801
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 290A at Seminole are North Latitude 35-12-53 and West Longitude 96-44-26.

FEDERAL COMMUNICATIONS COMMISSIONf

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-231

In the Matter of

Amendment of Section 73.202(b), RM-8076
Table of Allotments,
FM Broadcast Stations.
(Marlboro, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1992; Released: October 23, 1992

Comment Date: December 14, 1992
Reply Comment Date: December 29, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Mountain View Broadcasting, Inc. ("petitioner"), licensee of Station WXXX-FM, Channel 269A, Newport, New Hampshire, seeking the deletion of vacant Channel 268A at Marlboro, Vermont.

2. In support of its proposal, petitioner states deletion of Channel 268A at Marlboro would permit Station WXXX-FM to increase its power to the maximum permitted for a Class A station, thereby improving petitioner's service to the public. Petitioner further states that for more than four years the channel has remained vacant with only one applicant expressing an interest during that period of time.[1] Petitioner contends that deleting the channel at Marlboro would cause no harm to potential listeners in the community, since Marlboro is well within the primary service area of two full-time AM stations and two Class A FM stations licensed to Brattleboro, Vermont.[2]

3. We believe the public interest would be served by the deletion of Channel 268A at Marlboro, since it could enable Station WXXX-FM to increase its power. However, we note that the Commission does not delete a channel where an expression of interest is demonstrated by the filing of an application. Therefore, should the Commission receive an acceptable application by the initial comment deadline specified herein for Channel 268A at Marlboro, Vermont, petitioner's proposal to delete Channel 268A at Marlboro may be dismissed. Route Nine will be served with a copy of this *Notice*.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Marlboro, Vermont	268A	–

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 14, 1992,** and reply comments on or before **December 29, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David Tillotson, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(Counsel for petitioner)

7. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to Route Nine, a previous applicant for Channel 268A at Marlboro: Route Nine Broadcasting, Marlboro Road, P.O. Box 2108, West Brattleboro, Vermont 05301.

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. How-

[1] Petitioner notes Route Nine Broadcasting ("Route Nine"), an applicant for Channel 268A at Marlboro, has twice failed to file an acceptable application which complies with the Commission's minimum distance separation requirements. Petitioner states that Route Nine's latest application (BPH-890705MA) was returned as unacceptable on April 23, 1992, and Route Nine did not seek reconsideration or review of this action.

[2] Stations WTSA-AM/FM and WKVT-AM/FM are licensed to Brattleboro, Vermont.

ever, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-535

In the Matter of

Amendment of Section 73.202(b), RM-6980
Table of Allotments,
FM Broadcast Stations.
(Elizabeth City, North Carolina,
and Chesapeake, Virginia)

REQUEST FOR SUPPLEMENTAL INFORMATION

Adopted: September 24, 1992; Released: October 23, 1992

Comment Date: December 14, 1992
Reply Comment Date: December 29, 1992

By the Chief, Allocations Branch:

1. The Commission adopted a *Notice of Proposed Rule Making*, 4 FCC Rcd 8313 (1989), in response to a petition filed by Edge Broadcasting Company ("petitioner), licensee of Station WKOC-FM (formerly WMYK-FM), Channel 229C, Elizabeth City, North Carolina, proposing the change of community of license for Channel 229C at Elizabeth City to Chesapeake, Virginia, and the modification of Station WKOC-FM's license accordingly.

2. As the *Notice* states, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. Petitioner states that Chesapeake, the second fastest growing city in the Commonwealth of Virginia, has only one AM station.[1] Petitioner contends the change of community of license would provide Chesapeake (population 134,400) with its first local FM service. It states that Elizabeth City with a population 14,890 persons, currently receives local aural transmission service from two AM stations, two FM commercial FM stations, and one noncommercial educational FM station. Petitioner states that operating from its present site there will be no discernable change in the provision of existing service by Station WKOC-FM to either Elizabeth City, Chesapeake, or any other presently served area.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments. We note that Chesapeake is partially within the Norfolk-Virginia Beach-Newport News, Virginia Urbanized Area as defined by the U.S. Census Bureau. We question whether Chesapeake is deserving of a local service preference, or whether Chesapeake should be credited with all of the aural services licensed to the Urbanized Area. Petitioner is requested to submit information sufficient to show that Chesapeake is deserving of a such a preference using the Commission's three factors enumerated in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990) and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). Finally, we request petitioner to submit any additional information as to the overall public interest benefits that would be advanced from the grant of this proposal.[2] The Request for Supplemental Information does not afford an opportunity to file counterproposals.

4. Interested parties may file comments on or before **December 14, 1992,** and reply comments on or before **December 29, 1992.** Additionally, a copy of such comments should be served on petitioner's counsel as follows:

William M. Barnard, Esq.
McFadden, Evans & Sill
1627 Eye Street, N.W.
Suite 810
Washington, D.C. 20006
(Counsel for petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Station WFOS-FM, Channel 204B1, a noncommercial educational station, is also licensed to Chesapeake.

[2] *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990).

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-242

In the Matter of

Amendment of Section 73.202(b) RM-8087
Table of Allotments,
FM Broadcast Stations.
(Leavenworth, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1992; Released: October 26, 1992

Comment Date: December 18, 1992
Reply Comment Date: January 4, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ron Murray, d/b/a Murray Broadcasting ("petitioner"), proposing the allotment of Channel 249A at Leavenworth, Washington, as its first local aural transmission service.[1] Petitioner provides an engineering study in support of the proposal and states it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 249A at Leavenworth, Washington, since it could provide the community with its first local aural transmission service. Channel 249A can be allotted to Leavenworth in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site with a site restriction of 1.2 kilometers (0.7 miles) east of the community.[2] Since Leavenworth is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Leavenworth, Washington	---	249A

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt requested, a copy of this Notice of Proposed Rule Making to the licensee of Station KYSN(FM), as follows:

Stephenson Broadcasting, Inc.
960 Valley Mall Parkway
East Wenatchee, Washington 98802

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 18, 1992,** and reply comments on or before **January 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ron Murray
Murray Broadcasting
P.O. Box 288
Leavenworth, Washington 98826
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and com-

[1] Although petitioner's request indicates that the original copy of its proposal was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any documentation filed with the Commission by a party not represented by counsel shall be signed and verified by the party and its address stated. In the absence of such verification, the petition may be dismissed. Section 1.402(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. Petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 249A at Leavenworth are North Latitude 47-35-32 and West Longitude 120-38-35.

We note that the Leavenworth proposal is short-spaced to the presently licensed operation of Station KYSN(FM), Channel 249A, East Wenatchee, Washington, at coordinates 47-22-52 and 120-17-16, and thus dependent upon Station KYSN(FM) moving to Channel 266A in accordance with the modification provisions set forth in the *Report and Order* in MM Docket No. 91-114, *See* 6 FCC Rcd 6476 (1991). Since the Leavenworth allotment proposal is dependent upon the grant of a license for Station KYSN(FM) on Channel 266A, the issuance of a license on Channel 249A may be withheld until Station KYSN(FM) is authorized to operate on its new channel. The licensee of Station KYSN(FM) will be served with a copy of this *Notice*.

ment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-240

In the Matter of

Amendment of Section 73.202(b) RM-8085
Table of Allotments,
FM Broadcast Stations.
(Yakima, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1992; Released: October 26, 1992

Comment Date: December 18, 1992
Reply Comment Date: January 4, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KZTA Broadcasting, Inc., licensee of Station KZTA-FM ("petitioner"), proposing the substitution of Channel 259C3 for Channel 257A at Yakima, Washington, and the modification of Station KZTA-FM's license to specify operation on the higher powered channel.[1] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 259C3 for Channel 257A at Yakima, Washington, since it could provide the community with a wide coverage area FM service. Channel 259C3 can be allotted to Yakima in compliance with the Commission's minimum distance separation requirements at petitioner's requested site with a site restriction of 16 kilometers (9.9 miles) southeast to avoid a short-spacing to Station KISW, Channel 260C, Seattle, Washington.[2] As requested, we also propose to modify Station KZTA-FM's license to specify operation on Channel 259C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 259C3 at Yakima or require the petitioner to demonstrate the availability of an additional equivalent class channel. Since Yakima is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Yakima, Washington	233C1, 252A, 257A, 281C, 289C1, 297C	233C1, 252A, 259C3, 281C, 289C1, 297C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 18, 1992,** and reply comments on or before **January 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis J. Kelly, Esq.
Cordon and Kelly
Post Office Box 6648
Annapolis, Maryland 21401
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

[1] The assignment of the license for Station KZTA-FM from Big Bang, Inc., to KZTA Broadcasting, Inc., was granted on June 8, 1992 and consummated on June 30, 1992. See File No. BAL-920218ED.

[2] The coordinates for Channel 259C3 at Yakima are North Latitude 46-31-20 and West Longitude 120-19-59.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-239

In the Matter of

Amendment of Section 73.202(b), RM-8089
Table of Allotments,
FM Broadcast Stations.
(Cusseta, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1992; Released: October 26, 1992

Comment Date: December 18, 1992
Reply Comment Date: January 4, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Chattahoochee County Broadcasting ("petitioner") requesting the allotment of Channel 266A to Cusseta, Georgia, as that community's first local FM service. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 266A conflicts with pending proposals at Thomaston, Georgia (RM-8072), and Smiths, Alabama (MM Docket No. 92-199). Therefore, in an effort to accommodate petitioner's proposal, we sought an alternate channel and have determined that Channel 279A can be allotted to Cusseta at petitioner's desired transmitter site. Channel 279A can be allotted to Cusseta in compliance with the minimum distance separation requirements of the Commission's Rules without the imposition of a site restriction.[1]

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Cusseta, Georgia	–	279A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 18, 1992,** and reply comments on or before **January 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Timothy K. Brady
P.O. Box 986
Brentwood, TN 37027-0986
(Attorney for Chattahoochee
County Broadcasting)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 279A at Cusseta are North Latitude 32-18-18 and West Longitude 84-46-30.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-241

In the Matter of

Amendment of Section 73.202(b) RM-8084
Table of Allotments,
FM Broadcast Stations.
(Camas, Washington and
Seaside, Oregon)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 28, 1992; Released: October 26, 1992

Comment Date: December 18, 1992
Reply Comment Date: January 4, 1993

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Pacific Northwest Broadcasting Corporation, permittee of Station KMUZ-FM ("petitioner"), proposing the substitution of Channel 234C2 for Channel 234C3 at Camas, Washington, and the modification of Station KMUZ-FM's construction permit to specify operation on the higher powered channel.[1] In order to accommodate the upgrade, petitioner also requests the substitution of Channel 235A for Channel 234A at Seaside, Oregon, and the modification of Station KQEM(FM)'s construction permit accordingly.[2] Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 234C2 for Channel 234C3 at Camas, Washington, since it would enable Station KMUZ-FM to expand its coverage area. A staff engineering analysis reveals that Channel 234C2 can be substituted for Channel 234C3 in compliance with the Commission's minimum distance separation requirements at the petitioner's requested site with a site restriction of 28.7 kilometers (17.8 miles) east of the community.[3] Additionally, Channel 235A can be substituted for Channel 234A at Seaside, Oregon, at the authorized site of Station KQEM(FM) with a site restriction of 2.1 kilometers (1.3 miles) south.[4]

3. Since the petitioner's modification request at Camas is consistent with the provisions of Section 1.420(g) of the Commission Rules, we shall propose to modify the construction permit of Station KMUZ-FM without entertaining competing expressions of interest in the use of Channel 234C2 at Camas or require the petitioner to demonstrate the availability of an additional equivalent class channel. Canadian concurrence has been requested, since Camas and Seaside are located within 320 kilometers (200 miles) of the U.S.-Canadian border. In addition, we shall direct an *Order to Show Cause*, to the permittee of Station KQEM(FM) at Seaside, Washington, as to why its construction permit should not be modified to specify operation on Channel 235A in lieu of Channel 234A.

4. Whenever an existing licensee or permittee is ordered to change frequencies to accommodate a new channel allotment, Commission policy requires the benefitting party, or parties, to reimburse the affected station for costs incurred. In this instance, petitioner has stated its willingness to reimburse Station KQEM(FM) for reasonable costs incurred in changing its frequency.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Camas, Washington	234C3	234C2
Seaside, Oregon	234A	235A

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Kenneth S. Eiler, permittee of Station KQEM(FM), Seaside, Oregon, SHALL SHOW CAUSE why its construction permit SHOULD NOT BE MODIFIED to specify operation on Channel 235A in lieu of Channel 234A.

7. Pursuant to Section 1.87 of the Commission's Rules, Kenneth S. Eiler may, not later than **December 18, 1992,** file a written statement showing with particularity why its construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Kenneth S. Eiler to furnish additional information. If the Kenneth S. Eiler raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, the Kenneth S. Eiler will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the abovementioned channel modification is ultimately found to be in the public interest.

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[1] Petitioner has an application (BMPH-9208311H) pending before the Commission to modify Station KMUZ-FM's construction permit.

[2] Petitioner advises that the construction permit (BPH-880310MN) for Station KQEM(FM) has been assigned to the Monte Corporation and the call letters changed to KBRD(FM). Although the assignment of Station KQEM(FM)'s construction permit was granted on January 15, 1992, it has not been consummated. Accordingly, we will serve both the permittee and assignee with a copy of this *Notice of Proposed Rule Making and Order to Show Cause*.

[3] The coordinates for Channel 234C2 at Camas are North Latitude 45-32-20 and West Longitude 122-02-24.

[4] The coordinates for Channel 235A at Seaside are North Latitude 45-58-55 and West Longitude 123-55-02.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the following:

Kenneth S. Eiler
P.O. Box 53
Seaside, Oregon 97138
(Permittee of
Station KQEM(FM))

Lee W. Shubert, Esq.
Haley, Bader and Potts
Suite 600
2000 M Street, N.W.
Washington, D.C. 20036
(Counsel for Monte
Corporation)

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **December 18, 1992,** and reply comments on or before **January 4, 1993,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Louise Cybulski
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for Petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be

served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-23

In the Matter of

Amendment of Section 73.202(b),	RM-7900
Table of Allotments,	RM-7989
FM Broadcast Stations.	
(Hazard, Hyden, Jackson,	
and London, Kentucky)[1]	

ORDER TO SHOW CAUSE

Adopted: September 28, 1992; Released: October 26, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 7 FCC Rcd 1372 (1992), issued in response to a petition for rule making filed by Ethel Huff ("petitioner"), permittee of Station WYGE(FM), Channel 223A, London, Kentucky, requesting the substituion of Channel 222C3 for Channel 223A at London, Kentucky, and the modification of her construction permit (BPH-880817MH) to specify operation on the higher class channel. In order to accommodate the upgrade at London, petitioner also requested the substitution of Channel 223A for Channel 284A at Hazard, Kentucky, and the modification of Station WJMD(FM)'s license to specify Channel 223A; and the substitution of Channel 284A for Channel 222A at Hyden, Kentucky, and the modification of Station WZQQ(FM)'s license to specify Channel 284A (RM-7900). In response to the *Notice*, petitioner filed a counterproposal requesting the substitution of Channel 222C2 for Channel 223A at London, Kentucky, and the modification of her construction permit to specify operation on Channel 222C2. In order to accommodate this proposal, she also requested the substitution of Channel 250A for Channel 222A at Hyden, Kentucky, and the modification of Station WZQQ(FM)'s license to specify Channel 250A; and the substitution of Channel 293A for Channel 249A at Jackson, Kentucky, and the modification of Station WJSN(FM)'s license to specify Channel 293A.[2] Hazard Broadcasting Services, Inc. ("HBSI"), licensee of Station WJMD(FM), Hazard, Kentucky, filed opposing comments and reply comments.[3] Huff filed reply comments and comments restating her intention to apply for Channel 222C2, if allotted.

2. Huff in her counterproposal states that the the substitution of Channel 222C2 for Channel 223A at London, would provide additional reception service to nearly a quarter million persons in more than an 8,500 square mile area, which represents an increase of 78% in area and 92% in population above those that would have resulted from the C3 upgrade. Huff also states that the Class A substitutions will enable Station WSJN(FM), Jackson, and Station WZQQ(FM), Hyden, to operate as 6 kilowatt facilities, as they are both precluded from operating as 6 kilowatt facilities on their present channels by short-spacings. Huff states that she will reimburse the licensees of Stations WJSN(FM) and WZQQ(FM) for all reasonable costs as required by Commission policy.

3. We believe the public interest would be served by the consideration of Huff's counterproposal to substitute Channel 222C2 for Channel 223A at London, Kentucky, since it could provide the community with a wide coverage area FM service. In order to proceed with Huff's counterproposal in this proceeding, we must issue an *Order to Show Cause* to Intermountain Broadcasting Co., Inc., licensee of Station WJSN(FM), Channel 249A, Jackson, Kentucky, seeking comments as to why its license should not be modified to specify operation on Channel 293A instead of Channel 249A, as requested by Huff. This *Order to Show Cause* does not provide additional opportunity to comment on the merits of the proposal.

4. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Intermountain Broadcasting Co., Inc., licensee of Station WJSN(FM), Channel 249A, Jackson, Kentucky, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 293A in lieu of Channel 249A.

5. Pursuant to Section 1.87 of the Commission's Rules, Intermountain Broadcasting Co., Inc., may, not later than **December 17, 1992,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Intermountain Broadcasting Co., Inc., to furnish additional information. If Intermountain Broadcasting Co., Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Intermountain Broadcasting Co., Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

William P. Bernton 2 Mill Lane Yarmouth Port, MA 02675 (Attorney for Ethel Huff)	Intermountain Broadcasting Co., Inc. 1024 College Avenue Jackson, KY 41339 (Licensee of Station WJSN(FM))

[1] The community of Jackson, Kentucky, has been added to the caption.

[2] Public Notice of the counterproposal was given on May 14, 1992.

[3] These comments will be considered in the *Report and Order* in this proceeding.

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-75

In the Matter of

Amendment of Section 73.202(b), RM-7953
Table of Allotments,
FM Broadcast Stations.
(Boone and Emmetsburg, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1992; Released: October 26, 1992

By the Chief, Allocations Branch:

1. At the request of Radio Ingstad of Iowa, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 2347 (1992), proposing the substitution of Channel 252C2 for Channel 252C3 at Boone, Iowa, and the modification of Station KIAB(FM)'s license to specify operation on the higher class channel. To accommodate the allotment at Boone, the *Notice* also proposed the substitution of Channel 261A for Channel 252A at Emmetsburg, Iowa, and the modification of Station KEMB's license to specify operation on the alternate Class A channel.[1] Petitioner filed comments and reply comments reiterating its intention to apply for Channel 252C2, if allotted to Boone, and to reimburse Station KEMB for the costs associated with the change in its operating channel. No other comments were received.

2. We believe the public interest would be served "by substituting Channel 252C2 for Channel 252C3 at Boone since it could provide the community with a higher class channel and enable Station KEMB to expand its coverage area. Channel 252C2 can be allotted to Boone in compliance with the Commission's minimum distance separation requirements with a site restriction of 31.3 kilometers (19.4 miles) southwest to accommodate petitioner's desired transmitter site. Channel 261A can be allotted to Emmetsburg with a site restriction of 12.1 kilometers (7.5 miles) west.[2] As proposed, we will also modify the licenses of Stations KIAB(FM) at Boone and KEMB at Emmetsburg.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Boone, Iowa	252C2, 257A
Emmetsburg, Iowa	261A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Radio Ingstad of Iowa, Inc., for Station KIAB(FM), Boone, Iowa, IS MODIFIED to specify operation on Channel 252C2, in lieu of Channel 252C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Jacobson Broadcasting Corporation for Station KEMB, Emmetsburg, Iowa, IS MODIFIED to specify operation on Channel 261A in lieu of Channel 252A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KEMB's license, BLH-7417, except the channel as specified above. Any other changes, except those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-7417, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KEMB, as follows: Jacobson Broadcasting Corporation, P.O. Box 453, Estherville, Iowa 51334.

[1] As stated in the *Notice*, Channel 261A cannot be allotted to Emmetsburg at the coordinates specified in Station KEMB's license. However, the proposal was accepted for consideration and no Order to Show Cause was included in the *Notice of Proposed Rule Making* because the petitioner had furnished the Commission with a letter from Jacobson Broadcasting Corporation, licensee of Station KEMB, agreeing to both the change in channel and transmitter site.

[2] The coordinates for Channel 252C2 at Boone are North Latitude 41-49-00 and West Longitude 93-42-00. The coordinates for Channel 261A at Emmetsburg are 43-04-00 and 94-49-00.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Radio Ingstad, licensee of Station KIAB(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-150

In the Matter of

Amendment of Section 73.202(b),	RM-8024
Table of Allotments,	
FM Broadcast Stations.	
(Trenton, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1992; Released: October 26, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 4456 (1992), issued in response to a petition filed by Marvin E. Luehrs ("petitioner"), proposing the substitution of Channel 222C3 for Channel 221A at Trenton, Missouri.[1] Petitioner also requested modification of his license for Station KTTN-FM, Channel 221A, to specify operation on Channel 222C3. Petitioner filed supporting comments in which he reaffirmed his interest in the channel.[2] No other comments were received.

2. We believe the public interest would be served by substitution of Channel 222C3 for Channel 221A at Trenton, Missouri, since it would provide a wide coverage area station to the community. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[3] Channel 222C3 is short spaced to Channel 222A, Station KDEE, Cameron, Missouri. However, Channel 261C2 has been substituted for Channel 222A in MM Docket 89-558, effective May 15, 1992. *See* 7 FCC Rcd 2192 (1992). Authorization for the operation of KTTN-FM to operate on Channel 222C3 may be withheld until Station KDEE is authorized to operate on Channel 261C2. In addition, we have authorized a modification of the license for Station KTTN-FM, Channel 221A, Trenton, Missouri, to specify operation on Channel 222C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1992** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Trenton, Missouri	222C3

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Cameron Radio, Inc.
Station KDEE
Route 1, Box 29A
Cameron, Missouri 64429

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KTTN-FM, Channel 221A, Trenton, Missouri, IS MODIFIED to specify operation on Channel 222C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Luehrs Broadcasting Company, licensee of Station KTTN-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

[1] The assignment of the license for Station KTTN-FM from Marvin E. Luehrs, Luehrs Broadcasting Company to John A. Ausberger, Tim Peery and Mike Ransdell, Luehrs Broadcasting Company (BTCH-920529ED) was granted on July 8, 1992.

[2] Marvin E. Luehrs and John Ausberger, Luehrs Broadcasting Company filed supporting comments. In response to the *Notice*, petitioner verified the information contained in the petition for rule making.

[3] The coordinates for Channel 222C3 are 40-05-00 and 93-33-30.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-149

In the Matter of

Amendment of Section 73.202(b), RM-8023
Table of Allotments,
FM Broadcast Stations.
(Liberal, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1992; Released: October 26, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 4458 (1992), proposing the substitution of Channel 286C1 for Channel 286C2 at Liberal, Kansas, and modification of the construction permit (BPH-901116MC) for Station KZQD(FM) accordingly. The *Notice* was issued in response to a petition filed by Alpha Broadcasting, Inc. ("petitioner"). Petitioner filed comments restating its interest in the allotment.

2. We believe the public interest would be served by substituting Channel 286C1 for Channel 286C2 at Liberal, Kansas, in order to provide the area with additional reception service. As indicated in the *Notice*, Channel 286C1 can be allotted to Liberal consistent with the Commission's spacing requirements at petitioner's specified site.[1] We will authorize a modification of petitioner's construction permit for Station KZQD(FM), Channel 286C2, to specify operation on Channel 286C1 in accordance with Section 1.420(g) of the Commissions Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Liberal, Kansas	268C1, 274C1, 286C1, 298C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KZQD(FM), Channel 286C2, IS MODIFIED to specify operation on Channel 286C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Alpha Broadcasting, Inc., permittee of Station KZQD(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 286C1 at Liberal are 37-17-39 and 100-51-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-47

In the Matter of

Amendment of Section 73.202(b),	RM-7620
Table of Allotments,	RM-7731
FM Broadcast Stations.	
(Fairfield and Neoga, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1992; Released: October 26, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1337 (1991), issued in response to a petition filed by Fairfield Communications ("Fairfield") requesting the allotment of Channel 255A to Fairfield, Illinois, as that community's second local FM service.[2] Fairfield filed supporting comments. Mumbles Corporation ("Mumbles") filed a counterproposal requesting the allotment of Channel 255A to Neoga, Illinois, as that community's first local FM service.[3] Fairfield and The Cromwell Group, Inc. of Illinois ("Cromwell"), licensee of Station WMCI, Channel 267A, Mattoon, Illinois, filed reply comments.[4]

2. Mumbles states that Neoga does not have a local aural service, whereas Fairfield is presently served by Station WFIW(AM) and Station WFIW(FM). Mumbles states that the community of Neoga (population 1,736 persons) is located in Cumberland County (population 11,062 persons).[5] Mumbles states its intention to apply for Channel 255A, if allotted to Neoga. Fairfield in its reply comments suggests Channel 290A as an alternate channel for consideration at Fairfield to permit allotments at both communities.[6]

3. We believe the public interest would be served by the allotment of Channel 290A to Fairfield as that community's second local FM service, and the allotment of Channel 255A to Neoga as that community's second local FM service. In view of the availability of an alternate Class A channel for use at Fairfield, a comparative analysis is unnecessary. Channel 290A can be allotted to Fairfield, Illinois, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[7] Channel 255A can be allotted to Neoga, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction 4.7 kilometers (2.9 miles) southwest, in order to avoid a short-spacing to the licensed site of Station WIAI(FM), Channel 256A, Danville, Illinois.[8]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 10, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Fairfield, Illinois	285A, 290A
Neoga, Illinois	255A, 267B1

5. The window period for filing applications for Channel 290A at Fairfield, Illinois, and Channel 255A at Neoga, Illinois, will open on **December 11, 1992,** and close on **January 11, 1993.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[1] The community of Neoga, Illinois, has been added to the caption.

[2] The *Notice* erroneously stated that Channel 255A would be Fairfield's first local service. Channel 255A would provide the community with its second local FM service, as Channel 285A is also allotted to the community.

[3] Public Notice of the counterproposal was given June 5, 1991, Report No. 1847, RM-7731.

[4] After the record closed Cromwell filed a "Motion to Dismiss Comments and Counterproposal." The Commission's Rules do not contemplate the filing of pleadings beyond the reply comment period. *See* Commission Rule 1.415(d). Therefore, we will not consider these pleadings.

[5] Population figures are taken from the 1990 U.S. Census.

[6] Cromwell in its reply comments argues that the proposal advanced in MM Docket No. 90-477 seeking to change the community of license from Mattoon to Neoga, Illinois, should be considered by the Commission independent of the filings in this docket. Cromwell's proposal has since been granted. Channel 267B1 was substituted for Channel 267A at Mattoon, Illinois, and reallotted to Neoga, Illinois, as that community's first local FM service in MM Docket No. 90-477. *See* 7 FCC Rcd 5223 (1992).

[7] The coordinates for Channel 290A at Fairfield are North Latitude 38-24-21 and West Longitude 88-23-54.

[8] The coordinates for Channel 255A at Neoga, Illinois, are North Latitude 39-17-29 and West Longitude 88-29-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-253

In re Applications of

BAKCOR BROADCASTING, INC., Debtor
c/o DENNIS ELAM, TRUSTEE — File No. BRH-900330VV

For Renewal of License of
Station KKIK(FM), Lubbock, Texas

SOUTHWEST EDUCATIONAL MEDIA FOUNDATION OF TEXAS, INC. — File No. BPED-900629MK

For Construction Permit for a
New FM Station on Channel 229C1
Lubbock, Texas

HEARING DESIGNATION ORDER

Adopted: October 13, 1992; Released: October 26, 1992

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it: (1) the license renewal application of Bakcor Broadcasting, Inc., Debtor c/o Dennis Elam, Trustee ("Elam") for renewal of license of Station KKIK(FM), Lubbock, Texas; (2) the mutually exclusive application of Southwest Educational Media Foundation of Texas, Inc. ("SEMFOT") for a construction permit for a new FM station specifying the KKIK(FM) frequency;[1] (3) a joint request for approval of settlement agreement between Elam and SEMFOT filed July 12, 1991; (4) an opposition to the joint request filed September 6, 1991, by Williams Broadcasting Group ("Williams"); (5) a reply to Williams' opposition filed September 17, 1991, by Elam and SEMFOT; (6) a supplement to the joint request filed October 3, 1991, by Elam and SEMFOT; (7) an informal objection to the proposed settlement filed January 28, 1992, by Roger Taylor; and (8) an order from the Bankruptcy Court dated April 22, 1992, voiding the contract of sale between Elam and SEMFOT. Also before the Commission is a petition to dismiss or deny SEMFOT's application for a construction permit for a new noncommercial educational FM station in Midland, Texas.

2. The joint request, as supplemented, contemplated the dismissal of the Elam application for renewal of KKIK(FM), the grant of SEMFOT's construction permit application, and the purchase of KKIK's assets by SEMFOT for $75,000. However, in light of the order of the Bankruptcy Court voiding the contract for the sale of the assets of KKIK(FM), the joint request will be dismissed. Further, the oppositions to the joint request will be dismissed as moot.[2]

3. *SEMFOT.* SEMFOT proposes to side-mount its transmitting antenna on an existing tower. The Federal Aviation Administration ("FAA") and the Commission's Antenna Survey Branch list the overall tower height above ground ("AGL") and above mean sea level ("AMSL") for the KKIK(FM) tower as 272.2 meters and 1249.7 meters, respectively. However, in Section V-B, Item 7, SEMFOT has recorded an AGL value of 266.1 meters and an AMSL value of 1243.1 meters. Accordingly, SEMFOT must either file FAA Form 7460-1 with the FAA for the proposed change or amend its application, whichever is appropriate.

4. In addition, the staff's study reveals there is a possibility that SEMFOT's signal, when mixed with the signals of three (3) other stations (Stations KAMY(FM), KTEZ(FM), and KEJS(FM), Lubbock), would produce a signal which has the potential to cause receiver-induced intermodulation interference on the frequency of four (4) stations (Stations KATX(FM), Plainview, Texas, KDNC(FM), Denver City, Texas, KOKN(FM), Hobbs, New Mexico and KIOL-FM, Lamesa, Texas). Accordingly, SEMFOT is required to investigate this matter and submit a statement specifically accepting full responsibility for the elimination of any objectionable interference (including that caused by receiver-induced or other types of modulation) to facilities in existence or authorized or to radio receivers in use prior to grant of this application.

5. Our engineering study indicates that SEMFOT has failed to address the matter of how it proposes to resolve any RF exposure to workers on the tower. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that SEMFOT may have failed to comply with the environmental criteria set forth in the *Report and Order*, in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, an applicant must determine whether its proposal would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment ("EA") containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of

[1] An application to assign the license of Station KKIK(FM) from Bakcor/Elam to William S. Sanders (File No. BALH-900626EC) was dismissed by letter dated October 9, 1992.

[2] Essentially, the oppositions alleged that SEMFOT's president, T. Kent Atkins ("Atkins"), does not possess the requisite character qualifications to be a Commission licensee. Atkins' activities are being considered in conjunction with license renewal applications for Stations KENT-FM, Odessa, Texas, KRGN(FM) and KLMN(FM), Amarillo, Texas, as well as applications for KENT, Odessa, KAMY(FM), Lubbock, Texas, KBTT(FM), Bridgeport, Texas and KOJO(FM), Lake Charles, Louisiana. This proceeding will be made subject to whatever action, if any, the Commission deems appropriate as a result of any proceeding which may occur in respect to the above-named stations.

RF radiation exceeding specific standards. Since SEMFOT failed specifically to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally*, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," at 28. Therefore, SEMFOT will be required to file, within 30 days of the release of this Order, an EA with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the EA, that SEMFOT's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. *See* 47 C.F.R. § 1.1308(d).

6. On May 1, 1991, Elam's predecessor in interest, Bakcor Broadcasting, Inc./Bakke Communications, Inc. ("Bakke") filed a petition to dismiss or deny SEMFOT's application for construction permit for a new noncommercial educational FM station in Midland, Texas. On January 3, 1992, the Commission dismissed SEMFOT's construction permit application for Midland. Dismissal of the Midland application has rendered moot the allegation that SEMFOT did not have reasonable assurance of its Midland site. As for the other allegations in the petition to dismiss or deny, we conclude that, even though they were filed in connection with a different SEMFOT application, they are predesignation requests for issues. Accordingly, the remaining issues in Bakke's (now Elam's) petition to dismiss or deny will not be considered herein but may be raised in a petition to enlarge the issues pursuant to 47 C.F.R. § 1.229. *See Revised Processing of Broadcast Applicants*, 72 FCC 2d 202, 214 (1979). *See also, C. Ray Helton*, 4 FCC Rcd 1205, 1208, n.2 (MMB 1989).

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to SEMFOT in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. § 1.1301-1.1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

8. IT IS FURTHER ORDERED, That this proceeding will be made subject to whatever action, if any, the Commission deems appropriate as a result of any proceeding which may occur in respect to the license renewal applications for Stations KENT-FM, Odessa, Texas, KRGN(FM) and KLMN(FM), Amarillo, Texas, as well as applications for KENT, Odessa, KAMY(FM), Lubbock, Texas, KBTT(FM), Bridgeport, Texas and KOJO(FM), Lake Charles, Louisiana.

9. IT IS FURTHER ORDERED, That SEMFOT SHALL FILE, within 30 days of the release of this Order, an amendment resolving the tower height discrepancies noted in ¶ 3, above.

10. IT IS FURTHER ORDERED, That SEMFOT SHALL FILE, within 30 days of the release of this Order, the Environmental Assessment required by 47 C.F.R. § 1.1311 and serve a copy on the Chief, Audio Services Division.

11. IT IS FURTHER ORDERED, That SEMFOT SHALL FILE, within 30 days of the release of this Order, the statement noted in ¶ 4, above.

12. IT IS FURTHER ORDERED, That the Joint Request for Approval of Settlement Agreement filed September 10, 1991, by SEMFOT and Elam IS DISMISSED.

13. IT IS FURTHER ORDERED, That the opposition to the joint request filed by Williams Broadcast Group and the objection to the joint request filed by Roger Taylor, ARE DISMISSED AS MOOT.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Elam and SEMFOT may inquire as to the identity of the Bureau counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named Bureau counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, 1919 M Street, N.W., Room 350, Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Elam and SEMFOT, pursuant to 47 C.F.R. § 1.221(c), in person or by their respective attorneys, within 20 days of the release of this Order, SHALL FILE in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That Elam and SEMFOT, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and 47 C.F.R. § 73.3594, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice, as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-237

In the Matter of

Administration of the
North American Numbering Plan

NOTICE OF INQUIRY

Adopted October 9, 1992; Released: October 29, 1992

Comment Date: December 28, 1992
Reply Comment Date: January 27, 1993

By the Commission:

1. This Notice of Inquiry (NOI) will explore several long range issues related to the administration of the North American Numbering Plan (NANP or, the Plan). No immediate regulatory actions will be taken. Rather, we intend to gather information that the Commission may consider in other proceedings and activities.

2. Given the major changes occurring in the telecommunications industry over the past several years and disputes involving numbering issues, proposals for altering the plan have increased. The National Association of Regulatory Utility Commissioners (NARUC) has filed a petition asking the Commission to begin an inquiry.[1] Although there are differences of opinion about the scope of such a proceeding, the comments filed on that petition reflect broad support for this NOI.[2]

3. Phase one of this NOI focuses on who should administer the NANP and how the administration might be improved. We also seek comments on numbering for personal communications services and on local number portability. Phase two seeks comments on the costs, benefits, and technical issues associated with expanding the Carrier Identification Codes used for Feature Group D access to a four-digit format.

I. BACKGROUND

4. The basic numbering scheme for the nation's telephone system was developed by the Bell System; the current format was adopted in 1947, and first implemented in 1951.[3] When AT&T divested its operating companies on January 1, 1984, the numbering plan functions performed by AT&T were transferred to Bell Communications Research (Bellcore).[4] Since that time, a staff at Bellcore has served as the North American Numbering Plan Administrator (NANPA).

5. The numbering practices used within the NANP differ from those used in most of the rest of the world in that the NANP integrates the dialing of eighteen nations. In contrast, international calls to countries not included in the NANP require the dialing of international access codes, the dialing of country codes, and the dialing of telephone numbers that differ in length from country to country. The NANP covers World Zone 1 which includes the United States, Canada, Bermuda, and most of the Caribbean.[5] Thus, it encompasses virtually all of North America except Mexico.

6. The administrator of the NANP thus administers a numbering plan that covers the United States and seventeen other countries.[6] While this Commission has plenary jurisdiction over the numbering plan within the United States, most numbering plan issues have been resolved through industry negotiations and forums. Thus, Commission involvement has usually been restricted to disputes brought before the Commission for resolution.[7]

7. Each telephone in World Zone 1 can be reached by dialing a unique ten digit number. "NANP" is sometimes

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[1] National Association of Regulatory Utility Commissioners, Petition for Notice of Inquiry Addressing Administration of the North American Numbering Plan, filed September 26, 1991.

[2] A list of commenters and reply commenters appears in Appendix A.

[3] The details of the North American Numbering Plan are spelled out in Bell Communications Research, *BOC Notes on the LEC Network -- 1990*, Special Report SR-TSV-002275, Issue 1, March 1991, Section 3, Numbering Plan and Dialing Procedures.

[4] The Plan of Reorganization implementing AT&T's divestiture of its operating companies outlined certain technical functions related to numbering and dialing that would be performed by the Central Staff Organization (pp 372-3). Amendment No. 33, added at the request of the Department of Justice, stated that "[T]hus, for example, the Central Staff Organization will administer the North American Numbering Plan, including the assignment of 800 codes." (p 373) The amended Plan of Reorganization was approved and entered by the MFJ Court in United States v Western Electric Company, 569 F. Supp. 1057 (D. D. C. 1983). The Central Staff Organization was later redesignated Bell Communications Research Inc., the ownership of which is shared by the seven regional holding companies resulting from the divestiture.

[5] International numbering standards are developed under the auspices of the International Telegraph and Telephone Consultative Committee (CCITT). This organization, in turn, is a suborganization of the International Telecommunication Union (ITU) which is an agency of the United Nations.

[6] Three parties from Canada have filed comments. They generally support the initiation of a NOI. Unitel, comments, p 1; Cantel, comments, p 2. Telecom Canada takes no position, but indicates interest in participating in the proceedings if a NOI is issued; Telecom, comments, p 1. We note that the Canadian Department of Communications has recently formed a Canadian Steering Committee on Numbering to address a variety of numbering issues.

[7] See *Referral of Questions from General Communication Inc. v. Alascom Inc.*, 3 FCC Rcd 700, 709 (1988); *FCC Policy Statement on Interconnection of Cellular Systems*, Appendix A to *The Need to Promote Competition and Efficient Use of Spectrum for Radio*

used narrowly to refer to these ten digit numbers.[8] In this NOI we use the term more broadly to include other issues as identified herein.

8. In the NANP, each ten digit number is composed of three parts. The first three digits are called a "Numbering Plan Area" code or NPA code. Most of these codes indicate geographic areas and are simply known as area codes. At present,[9] these codes always conform to the following format: the first digit is never 0 or 1;[10] the second digit is always 0 or 1; and the third digit can be any number. Symbolically, this is often written as N 0/1 X, where N represents any digit except 0 or 1, and X is any digit from 0 through 9.

9. Using the current format, there are only 160 possible NPA codes.[11] Eight of these 160 codes have the format N00: (200, 300, 400...900) and are called Service Access Codes (SACs). Eight of the 160 codes have the format N11 (211, 311...911) and are called Service Codes. Most of the remaining 144 primary codes are recognizable as area codes: 141 are used as geographic area codes; one code is assigned to the U.S. government; one code is assigned for specialized uses in Canada,[12] and only one code has not yet been assigned.[13] Clearly NPA codes that resemble traditional area codes are in short supply.[14] Some of the N00 codes or N11 codes may have to be assigned as area codes in the near future.

10. The three digit NPA code is followed by a three digit secondary code and, finally, a four digit "station" or "line" number. Together, the secondary code and the line number comprise a typical 7 digit local telephone number. The secondary code is referred to as an "office" code, a "central office" code, or "CO" code. Traditionally, the format of the office code was NNX (using the previous notation). For the same reason as with area codes, the first digit could not be 0 or 1. In contrast to area codes where the second digit was always 0 or 1, the second digit of an office code was never 0 or 1. From a practical standpoint, this provided a simple way to distinguish between area codes and office codes: a telephone switch, by simply examining the second digit dialed, could identify the number being called as either beginning with an area code or a local number.

11. In recent years, the increasing proliferation of telecommunications services and service providers have placed increasing demands on numbering resources. Accordingly, it has long been expected that the stock of NPA codes in the present format would be exhausted sometime in the 1990's. A relief plan, adopted in 1962, features "interchangeable" codes.[15] In the new format, area codes and office codes will look alike: for example, the digits "632" could be used as an area code, and the digits "202" could be used as an office code. This change, scheduled for early 1995, will expand the number of potential NPA codes from 160 to 800.

12. NPA codes, of course, have great potential value. They have been requested by interexchange carriers for traffic routing purposes. They have been requested by cellular carriers for mobile service identification.[16] Recently one particular variant of these codes -- those in the form N11 -- have been requested by enhanced service providers for abbreviated dialing arrangements.[17]

13. Earlier this year, Bellcore published a proposal for allocating the new interchangeable NPA codes that will become available in 1995.[18] To accommodate mobile services and new personal communications services (PCS), the NPA codes used for such services would not necessarily be linked to specific geographic areas. Bellcore requested comments on its proposed allocation of new NPA codes and long term goals for the NANP. Comments were received on April 30, 1992.[19]

14. Heretofore, assignments of NPA codes (including both geographic area codes and service access codes) have been made by Bellcore.[20] Bellcore also assigns the office codes for 800 and 900 service. Bellcore does not assign the office codes within each geographic area code. This function was delegated by AT&T prior todivestiture to the local

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Common Carrier Services 59 R.R. 2d 1275, 1279 (1986) *recon. granted in part, denied in part,* 2 FCC Rcd 2910 (1987), *further recon. granted in part, denied in part,* 4 FCC Rcd 2369 (1989).

[8] Extra digits dialed at the start of a call (for example, the "0" to indicate that operator assistance is desired) are called prefixes and are not considered part of the numbering plan. Unlike numbering standards, there are no international agreements with respect to dialing arrangements. Dialing arrangements differ from country to country. Within the United States, they differ to some extent from state to state. For example, some states require that the digit "1" be used as a "toll indicator" for intralata toll calls.

[9] This is scheduled to change in 1995. See the discussion of interchangeable codes in paragraph 10 below.

[10] The digits 0 and 1 are used as prefixes to identify certain types of long distance calls and cannot therefore be used as the initial digits in either area codes or local numbers.

[11] This is the maximum number of combinations when there are 8 possibilities for the first digit, 2 for the second, and 10 for the third: 2*8*10=160.

[12] The code was assigned for use with teletypewriter service (TWX) and an Integrated Services Digital Network (ISDN). The administrator is seeking to reclaim this code for use as a geographic area code.

[13] Two codes were in prior years used by long distance carriers for routing calls to Mexico which is not part of World Zone 1 or the NANP. By translating these digits in the carrier switches, calls to Mexico could be completed using 10 digit dialing that resembled long distance dialing in the U.S. These codes were discontinued to permit the reassignment of these codes as geographic area codes. Subsequently, 706 was assigned to Georgia and 905 was assigned to Ontario.

[14] By way of comparison, 3 area codes were placed in service in 1991, 4 are scheduled for 1992, and 1 for 1993. These dates refer to the dates that permissive dialing begins rather than the earlier dates when codes are assigned or the later dates when use of the new codes are mandatory. Permissive dialing refers to a transition period when either the old number or the new number can be dialed to reach the same location.

[15] Ameritech comments, p 5.

[16] Telocator comments, p 9; McCaw comments, p 10.

[17] This matter is currently being considered by the Commission. See, The Use of N11 Codes and Other Abbreviated Dialing Arrangements, CC Docket No. 92-105, 57 Fed. Reg. 22681 (1992).

[18] Bell Communications Research, North American Numbering Plan Administrator's Proposal of the future of numbering in World Zone 1, January 2, 1992.

[19] Copies are available in the public reference room maintained by the Industry Analysis Division.

[20] After a decision is made to split an area code into two parts, the FCC and Bellcore have traditionally left the drawing of boundaries up to the local telephone companies and the state public utility commission. These local boundaries, particularly where a suburb wishes to continue to be included in the same area code as a metropolitan center, can be matters of intense local controversy. They also require extensive knowledge of local calling patterns and local office arrangements.

exchange carriers providing most of the service within each geographic area code. In most cases this is a Bell Operating Company although there are exceptions.[21]

15. So long as only traditional local telephone companies used office codes, the system generally worked smoothly. New entrants, however, complained that they had difficulty obtaining codes and that the local administrators were less willing to assign codes to their uses than to the LECs' own uses.[22] In June 1991, the Chief of the FCC's Common Carrier Bureau asked Bellcore to undertake the development of guidelines for the assignment of office codes within geographic NPAs.[23] Bellcore released draft guidelines in February 1992 and established a schedule of comments and conferences aimed at reporting results to the FCC later this year.[24]

16. The NANPA also assigns the carrier identification codes (CICs) used to reach (or "access") the services of long distance carriers. In equal access areas, these codes can be used to reach alternative long distance carriers by dialing 10XXX (where "XXX" is an alternative carrier's CIC). These codes can also be used to reach a long distance carrier by dialing 950-0XXX or 950-1XXX (where "XXX again represents a carrier's CIC code). As the supply of CIC codes approaches exhaustion, the current three-digit format of these codes is being altered to four-digits. The CICs used for 950 dialing will become four digits in 1993. For technical reasons, expanding the number of CICs used to reach long distance carriers by dialing 10XXX is much more complicated and not anticipated until 1995. Even if postponed until that date, the proposal remains complicated and expensive. This is discussed in more detail in paragraphs 35-37 below.

17. In addition to these efforts to develop guidelines and plan the use of NPA codes and office codes, the NANP administrators are involved in a variety of other activities, often in diverse forums. For example, Working Group II of the CCITT is considering recommendations regarding the numbering scheme to be used for Personal Communications Services (PCS). Similarly, a workshop of the Industry Carriers Compatibility Forum is considering uniform assignment of *XX vertical service codes and the question of whether these codes should also be expanded.[25] Bellcore also assigns Signalling System 7 network codes using assignment guidelines developed by Committee T1.[26]

18. As the previous discussion illustrates, the administration of the NANP involves far more than simple assignment of area codes. It requires a staff at Bellcore and a large number of employees at the LECs who deal with the administration of office codes. Further, over time the process has become contentious as more parties have sought codes.[27]

II. THE NARUC PETITION

19. NARUC petitioned the Commission to begin a wide ranging inquiry into the administration of the NANP.[28] NARUC's petition raises numerous issues: costs to ratepayers; the effects of new numbering schemes on existing equipment and dialing patterns; the possible competitive advantages to the Regional Bell Operating Companies of having Bellcore as the NANP administrator; and the effect on independent telephone companies and strategies for dealing with new services such as PCS. Twenty five parties filed comments on the NARUC petition and thirteen filed reply comments.[29]

20. Virtually all parties urge us to undertake a proceeding, although there are wide differences of opinion on the scope.[30] Some commenters urge a narrow and carefully defined inquiry. These parties generally suggest that we examine the administration of the NANP to ensure that it

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[21] GTE serves as administrator for area codes 808 and 813; Southern New England Telephone serves as administrator for 203, Alascom serves as administrator for 907; Cincinnati Bell for 513; Telecom Canada for 15 area codes used in Canada; and Bellcore itself serves as the administrator of 809 which covers Bermuda and the Caribbean.

[22] *See, e.g.*, formal complaints filed in Offshore Telephone Co. v. South Central Bell Tel. Co., 6 FCC Rcd 7481 (Com.Car.Bur.1991); Missouri RSA No. 7 v. Southwestern Bell Tel. Co., 6 FCC Rcd 7185 (Com.Car.Bur.1991).

[23] Letter from Richard M. Firestone, Chief, Common Carrier Bureau, Federal Communications Commission to Mr. Thomas Saunders, Vice President, Bell Communications Research, June 21, 1991.

[24] Bellcore has supplied copies of all comments and they are available in the public reference room maintained by the Industry Analysis Division.

[25] Vertical service codes are used by local exchange carriers for such services as call forwarding. To the extent that there is any uniformity, it appears to result from informal agreements among LECs. Some of the codes are published in the Local Exchange Routing Guide (LERG). The LERG, published by Bellcore, contains information which enables local telephone companies and long distance carriers to route traffic through the switched telephone network by identifying the physical location and routing information needed to reach each geographic location. Because the signalling is not used to route calls from one carrier to another, *XX need not be uniform among carriers. However, there may be some advantages in switch design and reducing customer confusion to be achieved from uniform usage. These codes could also be used to provide abbreviated dialing for enhanced service providers or other users.

[26] Signalling System 7 network codes identify the components within the SS7 network. In effect, they represent part of a network address used to route messages to and from the holder of the code. Committee T1 (Telecommunications) is an industry standards setting body sponsored by the Exchange Carrier Standards Association. It is accredited by the American National Standards Institute. The mission of Committee T1 (Telecommunications) is to develop technical standards and reports supporting the interconnection and interoperability of telecommunications networks at interfaces with end-user systems, carriers, information and enhanced-services providers, and customer premises equipment.

[27] UTI argues that any Commission proceeding should be a policy and appeals forum to resolve such matters, and that technical issues be left to industry forums to resolve. Reply comments, pp. 1-3.

[28] National Association of Regulatory Utility Commissioners, Petition for Notice of Inquiry Addressing Administration of the North American Numbering Plan, September 26, 1991.

[29] See Appendix A. Comments were filed on December 20, 1991, and reply comments were filed on January 17, 1992. All comments are available in the public reference room maintained by the Industry Analysis Division.

[30] Only Ameritech and USTA oppose a proceeding of any kind. US West opposes a NOI in its comments, but supports an inquiry into Bellcore's role as NANPA in its reply comments. Only BellSouth says that the NOI should lead to a Notice of Proposed Rulemaking.

is unbiased and reasonable, but, at the same time, refrain from examining specific issues that might delay the development of solutions to pressing problems already being addressed.[31] Other commenters urge the broadest possible examination of the issues.[32] Several parties raise additional issues.[33]

21. After reviewing the comments, we agree that an inquiry should be undertaken. We shall begin with a broad inquiry into the administration of the NANP and will defer consideration of a number of narrower issues.

III. NOI PHASE ONE: OVERALL ADMINISTRATION OF THE NANP

22. Phase one of this NOI will focus on who should administer the NANP and how the administration might be improved.

23. We note that the numbering plan has been administered over a long period of time with considerable skill and foresight.[34] Indeed, it is no exaggeration to say that the North American Numbering Plan is the envy of the rest of the world. Country codes are not needed for international calls within World Zone 1. The NANP provides a uniform dialing scheme applicable to eighteen countries, more than a thousand local exchange carriers, several hundred long distance carriers, and more than a hundred million end users.

24. Many numbering plan issues predictably take a long time to resolve. It takes years to design switches and software to accommodate a nationwide change in the numbering plan. Adequate long range planning is essential to minimize the investment costs needed to make changes. From this standpoint, the administration of the numbering plan by the Bell System and, subsequently, Bellcore, seems to have served the nation well.[35] For example, the concept of interchangeable codes and the basic plans to make that change were laid out as early as 1962--many years before their implementation.

25. Many parties, however, believe that administration of the NANP by Bellcore involves an inherent conflict of interest: some codes are required both by Bellcore's owners (the Bell Operating Companies) and their competitors. Some parties believe that Bellcore's staff must inevitably be influenced by the views of its owners. For example, MCI argues that Bellcore has demonstrated "a clear propensity to favor its owners when contention arises over limited resources."[36] Allnet contends that having Bellcore as administrator raises antitrust questions.[37]

26. The litany of complaints is perhaps longest among those associated with mobile services. Some cellular carriers note that each cellular telephone within an area code must be physically altered when that area code is changed. Despite these adverse effects, they claim to have little participation in the decision to alter area codes.[38] Other stated problems include difficulty in obtaining NXX codes, inefficient routing, and the fact that NXX code requests from cellular carriers are handled by BOC marketing personnel while similar requests from wireline carriers are not.[39] In short, some cellular carriers believe the NANP "is administered from a narrow, wireline perspective that affords mobile service providers little meaningful opportunity to have any say in the decision-making process."[40]

27. Bellcore replies that the NANPA is semi-autonomous and does not discriminate in favor of Bellcore's owners.[41]

28. We invite comments on the advisability of transferring NANP administration to an administrator other than Bellcore. Conceptually, the NANP administration could be done by others.[42] We seek comments generally on the costs and benefits of an internationally integrated numbering plan and integrated centralized administration.

29. Regardless of whether we conclude that Bellcore should remain as administrator of the NANP, we believe that the plan must be administered as efficiently as possible. Accordingly, we seek comment on the following technical administrative issues including how to provide the most effective oversight.[43]

30. AT&T notes that the present industry methods of dealing with numbering issues through industry consensus is satisfactory except that, in the event of deadlock within

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[31] UTI comments, pp 1-2. Centel comments p 2. SNET comments, p 4. USTA likewise urges us to exclude those issues which are "already being implemented by carriers and that are well into planning cycles". USTA comments, p 4.

[32] AT&T reply comments, pp 3-4. NARUC reply comments, p 6.

[33] The Florida PSC suggests including consideration of sustaining universal service, impacts on international communications, and minimizing the costs of manufacturing equipment needed to upgrade the NANP. Florida PSC comments, p 3. MCI suggests broadening the inquiry to consider alternative numbering schemes and the effects of new numbering plans on competition. MCI comments, p 8. MFS urges us to examine the feasibility and cost of implementing local number portability along the lines adopted in the 800 database proceeding. MFS comments, p 6.

[34] USTA offers a stout defense of Bellcore's activities as NANPA. Comments, pp 1-3.

[35] Bellcore notes that the NANPA works with domestic and international standards setting bodies such as the Industry Carriers Compatibility Forum to gain consensus on numbering issues.

[36] MCI comments p 5. MCI cites the assignment of CIC codes. Others cited the assignment of NXX codes. See, e.g., Telocator comments, pp 4-6. CompTel cites favoritism to AT&T over other IXCs in assigning CIID codes. CompTel reply comments, pp 6-8.

[37] Allnet comments, p 1. NYNEX says these concerns are unfounded. Reply comments, p 6.

[38] McCaw comments, pp 4-5; CTIA reply comments, pp 5-6.

[39] McCaw comments, p 8; Telocator comments, p 2.

[40] Telocator comments, p 2. See also, McCaw comments, p 3; Locate reply comments, pp 6-7.

[41] Bellcore argues that the NANPA operates in a "fish bowl", resolving problems in forums that include all facets of the industry. Bellcore adds that these forums provide both an opportunity to gain a consensus and an opportunity for other parties to challenge Bellcore's decisions. In Bellcore's view, the absence of complaints indicates the fairness of the current process. Comments, pp 3-5. We note that even some of the strongest critics give Bellcore credit for being more responsive in recent times. See, for example, Telocator comments, p 10.

[42] MFS comments, p 8; Telocator comments, p 3.

[43] GTE argues that "a well-documented and equitable process for assigning numbering resources is more critical than who administers the process." Comments, p 8. McCaw supports an inquiry to make the NANP administration process more open, public, and accountable. Reply comments, p 8.

the industry, no mechanism exists for making a decision. In the absence of a process to make decisions, disputes can lead either to no resolution at all or to unnecessary delay.[44]

31. Although the FCC has indicated that it stands ready to resolve formal complaints, this process can be lengthy and better adapted to resolving legal disputes than complex technical questions. Further, formal complaints tend to be filed at a late stage in a dispute while the long planning horizons required with respect to numbering plan issues mean that early involvement by decision makers is often needed. We seek comments on whether the mediation or arbitration techniques as provided by alternative dispute resolution and negotiated rulemaking can be fruitfully applied to situations where the industry is unable to achieve consensus.[45]

32. Bellcore suggests that an advisory council be established to advise it on issues relative to the administration and design of the NANP.[46] We ask, if the NANPA remains at Bellcore for the foreseeable future, what advisory or oversight bodies, if any, should be established? Should formal structural separation be applied between the NANPA and the rest of Bellcore? How should the FCC oversee Bellcore or any other entity charged with plan administration?

33. A subject closely related to who should administer the NANP is how the costs of administration should be financed. The costs of the NANP are, in effect, paid by Bellcore's owners and their customers. It is at least questionable whether we can continue to expect these costs to be incurred by private firms without compensation. Still other costs are incurred by the local exchange carriers who administer individual NPA codes.

34. When office codes are assigned within an NPA, charges are normally imposed on the recipient. In turn, there are certain costs of administering office codes--if nothing more than configuring switches and keeping track of line numbers. Entities that are assigned office codes frequently charge for setting aside blocks of numbers. To the extent that charges are imposed for office codes or numbering functions within office codes these appear to be either tariffed at the state level or contractually negotiated.

35. While some respondents[47] suggest we address these costs, we decline to do so in this proceeding. In this initial review of the NANP we will only consider how the costs of national administration should be handled, including issues relating to the costs of area code administration performed by the NANPA. We will defer any questions related to the costs of office code administration.

IV. PHASE TWO: FEATURE GROUP D ACCESS CODES

36. As described in paragraph 15 above, each long distance carrier has a carrier identification code (CIC) issued by the NANPA. Currently, the same code is used for both Feature Group B access (by dialing 950-0XXX or 950-1XXX) and for Feature Group D access (by dialing 10XXX). Almost all available codes have been assigned and the industry has agreed upon plans to expand the codes to four digits.

37. Beginning in 1993, carriers will have different codes for Feature Group B (FGB) and Feature Group D (FGD) access. At that same time, FGB codes will be expanded to 4 digits. The change to 4-digit FGB codes is relatively simple and inexpensive. The expansion of FGD codes is more complex. In fact, the format agreed upon for implementation in 1995 would replace 10XXX dialing with 101XXXX. This would require dialing extra digits, require carriers to retrain their customers and, according to commenters, will be technically difficult and expensive.[48] It would also result in the access code having the same number of digits as other local telephone numbers. This raises the question of whether special access codes remain worthwhile if they are no shorter than other seven digit numbers.

38. In the past, rather than rationing codes or taking other approaches, the number of codes has been expanded as exhaustion approached.[49] Because 10XXX dialing will accommodate 1,000 long distance carriers or other purchasers of access, we inquire as to whether it is worthwhile to move from 10XXX to 101XXXX access. Given the long planning horizon involved--related to the number of years needed to convert and/or replace switches--planning for any reconsideration of the desirability of making the change for Feature Group D access needs to be done immediately. In light of these concerns, we ask the following questions:

1. What are the costs and technical issues associated with converting FGD CIC codes to a 4-digit format?

2. What are the benefits of doing so and how do these benefits compare with the costs?

3. Are there alternative technical approaches that would allow all long distance carriers and other end users to achieve equal access?

4. If FGD codes are not expanded, what rules should govern the assignment, recall, transfer and use of the FGD codes that will be available?

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[44] AT&T comments, p 3.

[45] US West comments, pp 5-6.

[46] North American Numbering Plan Administrator's Proposal on the Future of Numbering in World Zone 1, p 27.

[47] GTE comments, p 10; Pacific Telesis comments, p 9; US West comments, pp 6-8.

[48] Bell Atlantic reply comments, pp 2-3.

[49] In 1986, when ruling on a dispute arising from Pacific Bell's refusal to provide FGB access to First Data Resources, the Common Carrier Bureau required Pacific Bell to provide access, citing the principle that "interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and [interexchange carrier] customers." The Bureau was not convinced that code exhaustion was either imminent or inevitable and did "not believe that the possible scarcity of codes in the future justifies treating [interexchange carrier] and end user customers of interstate access services differently." (Memorandum Opinion and Order, In the Matter of Petition of First Data Resources, Inc Regarding the Availability of Feature Group B Access Service to End Users, released May 28, 1986, paragraph 13.) The Order did not, however, foreclose the possibility of revisiting the issue in the event that the availability of "numbers should in the future prove to be inadequate or in real jeopardy." (Paragraph 17)

V. OTHER ISSUES

39. We seek comments on the following two issues. Comments on these issues should be included with other comments in Phase 1 of this proceeding.

40. *PCS numbering.* The numbering schemes used for Personal Communications Services are important and are the subject of both domestic and international discussions. Although this issue is now being considered in other forums,[50] we seek comment on what actions should be taken by this Commission to foster such services.

41. *Local number portability.* Competitive access providers argue that the inability of customers to change carriers without changing telephone numbers provides a barrier to local competition. They urge us to investigate local number portability.[51] We seek comments on the costs and feasibility of local number portability. We also seek information on the lessons learned from the experience of implementing number portability for 800 services.

42. NARUC and commenting parties have also raised numerous other issues that we decline to address at this time. Some of the issues are already being considered in other forums, some are not yet ripe for consideration, and some are so close to implementation that the costs of reconsideration and potential delay seem to outweigh the benefits of their inclusion. We summarize these issues below and inquire generally as to which of these issues should be addressed in future Commission proceedings and which should be left to other forums.

43. *Implementation of interchangeable area codes.* As noted in paragraph 10 above, the nation's current stock of area codes is rapidly approaching exhaustion and an interchangeable format is scheduled for 1995.[52] A number of other approaches could have been taken to solve the problem of area code exhaustion and might have been selected if that decision had been made many years ago. For example, area codes might have been lengthened to four or more digits while retaining the distinctive 0 or 1 as the second digit. Alternatively, local telephone numbers might have been lengthened to eight or more digits so that each existing area code would accommodate more local numbers. Instead, for at least 20 years the industry, and switch manufacturers, have worked toward interchangeable codes.[53] Some 30 of the nation's area codes have already converted to using office codes with the new format.[54] The remaining NPAs are scheduled to have this capability by 1995.[55] Although NARUC asks us to examine alternatives, the commenters are virtually unanimous in urging us not to reopen this issue. Most of those comments stress the long lead times, costs, and the problem of creating uncertainty by doing so.[56] Accordingly, we believe it is far too late to consider alternatives and will not reopen the issue.

44. *Allocation of interchangeable NPA codes.* As noted in paragraph 12 above, the NANPA is now taking comments on proposals on how the new stock of codes should be allocated. We will not simultaneously attempt to examine that issue.

45. *Allocation of office codes.* As noted in paragraph 14 above, the NANPA is now engaged, at the request of the Common Carrier Bureau, in an effort to achieve consensus on guidelines for the assignment of office codes within geographic area codes. Their effort, which began in 1991, will not be completed until later this year. We will not consider the issue of office code assignments until after the current effort is complete.

46. *Four digit codes for Feature Group B access.* These are scheduled for implementation in 1993, the cost is relatively small, and the industry is well along toward implementation. Further, all parties raising the issue urge us not to reconsider and delay and we will not do so.[57]

47. *Classification of costs for the purposes of price caps.* Several carriers suggest that we should consider making certain numbering plan costs exogenous for the purpose of price caps.[58] Others suggest that this is simply an attempt to relitigate price caps in this proceeding and urge us to dismiss the suggestions.[59] We decline to expand the large number of issues already under consideration by including the reclassification of costs for price caps. It is too early to tell whether this issue needs to be readdressed. If and when it needs to be readdressed, we will do so in another proceeding.

48. *Allocation of service codes.* This matter is currently being considered in CC Docket No. 92-105.

49. *Reporting requirements.* NARUC has suggested that additional reporting requirements be imposed for monitoring numbering plan issues. GTE argues that a variety of reports received by the Commission's Industry Analysis Division provide sufficient information and that no further reporting requirements should be imposed.[60] Others cite the Central Office Code Utilization Survey (COCUS) provided annually to Bellcore in arguing that no further reports are needed.[61] We agree that at this point the need for further reports has not been established.

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[50] Domestically, PCS numbering is being considered by the Standards Committee T1-Telecommunications of the Exchange Carriers Standards Association. Internationally, the issue is being considered by the CCITT. GTE urges us to leave PCS numbering to CCITT unless the work of that committee shows evidence of results detrimental to US interests. GTE comments, p 6.

[51] MFS comments, pp 6-8. Teleport comments p 2.

[52] For more discussion of interchangeable codes, see Ameritech comments, pp 5-7, and GTE comments, p 2.

[53] According to Ameritech's count, more than 20 manufactures and vendors are affected by switch upgrades and software modifications.

[54] NYNEX comments, p 5.

[55] The original date was July 1, 1995. It was recently moved up to January 1, 1995. NYNEX comments, p 5.

[56] GTE comments, pp 2-4; USTA comments, p 4. UTI believes that cross-bar switches will need to be replaced in order to implement interchangeable NPA codes but believes that there are no reasonable alternatives. UTI comments, p 3.

[57] Ameritech provides a lengthy discussion of CIC history (comments, pp 1-10) and cites the expansion of CIC codes as "a mode of how the industry can resolve its own numbering needs with regulatory oversight and support" (comments, p 10). See also USTA comments, pp 4-5.

[58] Ameritech comments, pp 11-13.

[59] MCI reply comments, p 6.

[60] GTE comments, p 6.

[61] Ameritech comments, pp 17-18.

50. *A variety of tangential issues in other proceedings.* These include matters dealing with 800 service and calling cards. While the issues involved in those matters sometimes touch upon numbering issues, they will not be reargued in this proceeding.

VI. PROCEDURAL MATTERS

51. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, all interested parties may file comments on the matters raised in this Notice of Inquiry. Comments on Phase 1, related to the overall administration of the North American Numbering Plan, should be filed by December 28, 1992. Reply comments are due by January 27, 1993. Comments on Phase 2, relating to the expansion of Feature Group D access codes, should be filed by **December 28, 1992.** Reply comments should be filed by **January 27, 1993.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

52. This proceeding is a notice of inquiry. *See* 47 C.F.R. Section 1.430. *Ex parte* comments will be permitted. *See* 47 C.F.R. Section 1.1204(a)(4).

53. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 218, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 218, and 403, THAT this *Inquiry* IS HEREBY INSTITUTED and that the Secretary shall cause this Notice to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

COMMENTS FILED ON NARUC PETITION DA 91-1307

1. Allnet Communications Services, Inc. ("Allnet")
2. American Telephone and Telegraph Company ("AT&T")
3. Ameritech Operating Companies ("Ameritech")
4. Bell Communications Research, Inc. ("Bellcore")
5. South Central Bell Telephone Company and Southern Bell Telephone & Telegraph Company ("BellSouth")
6. Rogers Cantel Inc. ("Cantel")
7. Centel Corporation ("Centel")
8. Public Service Commission of the District of Columbia ("D.C. PSC")
9. Florida Public Service Commission ("Florida PSC")
10. GTE Service Corporation ("GTE")
11. McCaw Cellular Communications, Inc. ("McCaw")
12. MCI Communications Corporation ("MCI")
13. Metropolitan Fiber Systems, Inc. ("MFS")
14. National Telephone Cooperative Association ("NTCA")
15. New England Telephone & Telegraph Company and New York Telephone Company ("NYNEX")
16. Pacific Bell and Nevada Bell ("Pacific Telesis")
17. Rochester Telephone Corporation ("Rochester")
18. Southwestern Bell Telephone Company ("SWBT")
19. Telecom Canada ("Telecom")
20. Telocator
21. Teleport Communications Group ("Teleport")
22. United States Telephone Association ("USTA")
23. United Telecommunications, Inc. ("UTI")
24. Unitel Communications Inc. ("Unitel")
25. U S West Communications, Inc. ("U S West")

REPLY COMMENTS

1. American Telephone and Telegraph Company ("AT&T")
2. Ameritech Operating Companies ("Ameritech")
3. Bell Atlantic Telephone Companies ("BellAtlantic")
4. Bell Communications Research, Inc. ("Bellcore")
5. Cellular Telecommunications Industry Association ("CTIA")
6. Competitive Telecommunications Association ("CompTel")
7. Local Area Telecommunications, Inc. ("Locate")
8. McCaw Cellular Communications, Inc. ("McCaw")
9. MCI Communications Corporation ("MCI")
10. National Association of Regulatory Utility Commissioners ("NARUC")
11. New England Telephone & Telegraph Company and New York Telephone Company ("NYNEX")
12. United Telecommunications, Inc. ("UTI")
13. U S West Communications, Inc. ("U S West")

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-402

In re Applications of

HELEN BROADCASTERS, INC. File No. BPH-890426MI

ANTHONY LAMAR CANUP and GEORGE M. PASS d/b/a WHITE COUNTY BROADCASTING File No. BPH-890427ME

For construction permit for a new FM station on Channel 286A at Helen, Georgia.

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 1992; Released: October 28, 1992

By the Commission:

1. Anthony Lamar Canup and George M. Pass d/b/a White County Broadcasting ("WCB") filed an application for review of the Review Board's decision in this case, 7 FCC Rcd 2501 (1992),[1] which held that Helen Broadcasters, Inc. ("HBI") is better qualified than WCB. The Board noted that WCB proposed integration of only one of its two 50 percent owners and accordingly gave it an HHI score of 5000 for quantitative integration, whereas it found that HBI's sole owner could be relied upon to devote at least 32 hours per week to station management and therefore that HBI rates an HHI score of at least 6400.[2] *Id.* at 2501 ¶ 2, 2503 n.6. WCB contends in its application for review that it should prevail under the comparative issue because HBI deserves no integration credit at all. We will deny the appeal.

2. *Admission of HBI's integration proposal into evidence.* WCB contends that HBI's proposal for integration of its sole principal, Charles Smithgall, should be excluded from consideration because HBI did not provide information in its direct case exhibits as to the extent of his involvement in certain activities and how he would accomodate his interest in pursuing them with his ostensible plan to devote 40 hours per week to station management. The Board gave credence to HBI's integration plan because it found in light of testimony elicited from Smithgall through cross examination that his future involvement in one of the activities, a private undertaking to restore a 5,500 acre tract known as Dukes Creek Woods to its original condition, would be minimal and that his involvement in the other activity, managing investment of his own capital, would not occupy him on any weekday other than Friday. *Id.* at 2502 ¶ ¶ 9-10, 2503 n.6. WCB argues that, inasmuch as HBI bore the burden of proof as to the reliability of its integration proposal, it was incumbent upon it to present a specific and credible explanation in its *direct* case as to how Smithgall would accomodate his interests in these projects with the proposal for his integration and that in consequence of its failure to do so its claim of integration credit must be rejected, regardless of any testimony developed in cross examination. To rule otherwise, WCB maintains, is to shift the burden of proof. We disagree.

3. HBI presented, in its direct case, a sworn statement from Smithgall averring that he is HBI's sole owner and pledging to devote 40 hours per week to the station in the role of general manager. HBI Exh. 2, p.1. This constituted *prima facie* evidence that its integration plan would be carried out in the event of its receiving a grant. Therefore, its claim of integration credit is not to be summarily rejected; rather, to determine whether HBI has met its burden of proof concerning integration, the entire record is appropriately considered, including testimony on cross examination.[3]

4. *The finding that Smithgall will not devote significant amounts of time to the Dukes Creek Woods project.* WCB further contends that the Board's finding that Smithgall's work on the Dukes Creek Woods project does not currently occupy a significant amount of his time and is not likely to require much attention in the future, 7 FCC Rcd at 2502 ¶10, is not sustained by a preponderance of the evidence. We disagree.

5. The finding is supported by Smithgall's testimony that he currently spends only one hour per week on the Dukes Creek project and does not expect to devote a greater proportion of his time to it in the future, as the work that the project entails is virtually complete. *Initial Decision*, 6 FCC Rcd 6064, 6065 §9, 6066 ¶19 (ALJ 1991). Albeit self-serving, that testimony is not inherently implausible and is therefore a sufficient basis for the finding in question unless other evidence materially contradicts it or otherwise demonstrates that Smithgall is not a credible witness.

6. WCB maintains that various bits of evidence contradict that testimony. It cites evidence that, for instance, Smithgall has spent a great deal of his own money on the conservation project, purchased 5,500 acres of land for it, and hired a staff of 12 to implement it, none of which supports an inference that he will devote more than one

[1] WCB filed an application for review on May 21, 1992 and an erratum together with a corrected application for review on May 26. Helen Broadcasters, Inc. filed an opposition on June 5.

[2] The Commission uses a method of weighting based on the Hirschman-Herfindahl Index (HHI) to assign comparative credit in cases involving proposals for part-time integration. See *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 733-34 ¶ ¶ 25-32 (1988).

[3] In *Naguabo Broadcasting Co.*, 6 FCC Rcd 4879 (1991), which WCB cites to support its argument, the Commission held that in order to meet his burden of proof as to integration in the face of evidence that he was currently devoting substantial amounts of time to management of business enterprises, an applicant had to present a specific credible plan for accommodating those interests with his commitment to full-time integration in daily management of the proposed broadcast station. *Id.* at 4880 ¶ 8. There is no inconsistency between that holding and our rejection here of WCB's contention that HBI should be denied integration credit for failure to present an accommodation plan in its direct case. *Naguabo* does not hold that an applicant with potentially conflicting activities must present an accommodation plan in its *direct* case to receive credit for integration.

hour per week to the project in future. It cites a prehearing statement by Smithgall that he is working with a biologist to develop a wildlife management plan and is involved in implementing a plan to restore Dukes Creek as a trout habitat, ignoring his testimony, Tr. 36, that he has already carried out all of the biologist's basic recommendations and that the work necessary to make the stream fit for trout is nearly finished. Likewise, WCB cites testimony indicating that Smithgall is involved in some way in putting a fence around the Dukes Creek property without acknowledging his accompanying testimony, Tr. 116, that the fencing task, too, is essentially finished. It also cites evidence (HBI Exh. 2, p.6 and Tr. 100, 138) that allegedly discloses that Smithgall "is working on plans" to open a portion of the preserve to the public but which actually shows merely that he has considered allowing public access and has tentatively decided to afford limited access to certain persons or organizations; there is no evident reason to infer that such matters will occupy him for significant amounts of time.

7. Next, WCB cites testimony that Smithgall spent 150 nights in Helen in 1990, "spending some nights there to oversee the project," and alleges, citing other evidence, that he built a $750,000 home there so that he could live near it. The record does not show, however, that Smithgall had the new home built just so that he could conveniently commute to work on the Dukes Creek Woods project. He testified that he had the house built near Helen because of the beauty of the countryside there, which he called "the most beautiful spot in the country," and that the home was "what I always wanted," Tr. 40, 129. The findings suggest that his interest in developing the Dukes Creek Woods preserve was consequent to a prior interest in residing near Helen, which he had been visiting regularly for 30 years, rather than *vice versa*. 6 FCC Rcd at 6065 ¶ ¶ 10-11. Smithgall denied that he had supervised the project on most of the days that he spent in his Helen residence, Tr. 40, and, in any event, the amount of time that he devoted to supervising the project in 1990 has slight bearing on the credibility of his integration commitment in light of his uncontradicted testimony that there is little left to occupy him in the development of the Dukes Creek Woods preserve. Finally, WCB cites a remark in Smithgall's testimony to the effect that he had employees write checks for him because he was too busy to do so. Tr. 87. Regardless of whatever significance might otherwise be attributed to it, that remark is immaterial in light of Smithgall's immediately following explanation that it was his practice to delegate the chore of check-writing because he found it to be tedious and therefore preferred to spend his time in other ways. *Id.* In short, WCB cites no evidence that materially undermines the Board's finding that Smithgall will not be occupied with the Dukes Creek Woods project to such an extent as to cast doubt on the reliability of his integration commitment.

8. *Alleged conflict between Smithgall's integration commitment and his involvement in managing investments.* Smithgall employs a staff in an office in Atlanta to write checks and manage investments on his behalf, and he testified that it has been his practice to go to Atlanta on Fridays and spend one or two days there, at least partly in order to instruct the staff as to the payment of bills. 7 FCC Rcd at 2502-03 ¶ ¶ 11-12; Tr. 52-53, 63-64, 86-87. He indicated in his testimony that he would continue to travel to Atlanta on Fridays if the Commission grants HBI's application and that in that event he will call on national advertising representatives there to sell airtime. 7 FCC Rcd at 2503 ¶12; Tr. 122, 125. He did not say whether, in that event, he would also continue to meet with his Atlanta office staff during his weekly visits to that city.

9. While acknowledging that the record does not disclose the extent to which Smithgall would occupy himself on matters other than station business during his weekly forays to Atlanta, the Board held that the absence of evidence in this regard is immaterial. It reasoned that assuming, as a "worst case scenario," that Smithgall would devote all day on Fridays to other pursuits, HBI still deserves credit for 32-hour-a-week integration, there being no reason to doubt that he would fulfill his commitment to that extent by working 8 hours per day from Monday through Thursday, and that this is enough for comparative superiority over WCB. 7 FCC Rcd at 2503 n.6.

10. WCB contends that this holding is untenable because precedent establishes that none of the time that Smithgall plans to spend each week in Atlanta can be counted toward fulfillment of his full-time integration commitment, citing *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 4596, 4597 ¶ ¶ 7 and 10 (1990), and because the evidence shows that Smithgall will spend one *or two* days in Atlanta each week.[4] Furthermore, WCB argues, citing *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5750, 5752 ¶14 (1990), and *Cuban American Ltd.*, 5 FCC Rcd 3781, 3786 n.3 (1990), that the Board erred here in granting partial integration credit to an applicant that failed to demonstrate the reliability of its full-time integration proposal. However, as the Board indicated, 7 FCC Rcd at 2503 n.6, even if he were to spend all day Friday and Saturday in Atlanta, Smithgall would have at least four weekdays (Monday through Thursday) in which to work at the new station, and on this basis merits a dispositive integration preference. We agree with the Board that as the evidence shows that Smithgall will be integrated part-time for a definite number of hours per week at minimum, *Marlin* and *Cuban American* are inapposite. We therefore affirm the judgment that HBI is the superior applicant.

11. ACCORDINGLY, IT IS ORDERED that the application for review filed by White County Broadcasting on May 21, 1992 and corrected on May 26, 1992 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[4] WCB also urges that the fact that Smithgall has maintained an office/residence in Gainesville, 30 miles from Helen, detracts from his integration proposal. The record shows, however, that Smithgall changed his residence to Helen after completion of construction of his new $750,000 house there in November 1990. 7 FCC Rcd at 2503 ¶11; 6 FCC Rcd at 6065 ¶ ¶ 12-13.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-80

In re Application of

PETER JOSEPH DEVLIN and PATRICIA EVE DEVLIN — File No. BPH-880216MS

Earl J. Brooker and Carol L. Brooker d/b/a BROOKER BROADCASTING — File No. BPH-880217ML

For a Construction Permit for New FM Station, Channel 282A (104.2 MHz), Seymour, Wisconsin

ORDER

Adopted: October 16, 1992; Released: October 28, 1992

By the Commission:

1. Before the Commission for consideration are an Application for Review filed May 22, 1992, by Peter J. Devlin and Patricia E. Devlin (the Devlins) and an Opposition filed June 5, 1992, by Brooker Broadcasting.[1] These pleadings relate to a Review Board decision, *Peter Joseph Devlin and Patricia Eve Devlin*, 7 FCC Rcd 2499 (1992), granting the application of Brooker Broadcasting and denying the Devlins' application. We agree with the Board's disposition of this case and affirm its decision.

2. ACCORDINGLY, IT IS ORDERED pursuant to 47 C.F.R. § 1.115(g) that the application for Review filed May 22, 1992, by Peter J. Devlin and Patricia E. Devlin IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Because we find that oral argument would not assist us in resolving this matter, the Devlins' companion request for oral argument is denied. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 163 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC TELEPHONE COMPANIES

Offer of Comparably Efficient Interconnection to Providers of Gateway Services

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 1992; Released: October 28, 1992

By the Commission:

I. INTRODUCTION

1. In this Order, we address an Application For Review (the Application) filed by ALC Communications Corporation (ALC) requesting a review of a Common Carrier Bureau Order approving Bell Atlantic's CEI plan for the provision of gateway services.[1] Bell Atlantic filed comments in opposition to the Application, and three parties filed reply comments.[2] Bell Atlantic also filed a motion to strike ALC's reply comments. For the reasons discussed below, we deny the Application for Review.

II. BACKGROUND

2. In the *Computer III* proceeding, the Commission required, as a precondition for the elimination of the structural separation requirements governing the BOCs' provision of enhanced services, that the BOCs develop Open Network Architecture (ONA) plans.[3] Under ONA, the BOCs must unbundle basic technological capabilities, and offer them to the public under tariff. The Commission also established in that proceeding that on an interim basis, prior to Commission approval of ONA tariffs, a BOC may offer a specific enhanced service or class of services on an unseparated basis only after Commission approval of a Comparably Efficient Interconnection (CEI) plan.[4] The Commission's CEI requirements mandate that BOCs provide interconnection opportunities to BOC enhanced service providers (ESPs) and to other enhanced service providers and users on an unbundled and functionally equal basis.[5] The Commission has stated that its mandatory CEI plan filing requirement is only an interim measure designed to allow a BOC offering of a specific enhanced service to the public, while the Commission proceeds with the long-term process of approving and implementing the broader ONA plans.[6]

3. On September 23, 1988, the Common Carrier Bureau adopted a Memorandum Opinion and Order in the above captioned proceeding approving Bell Atlantic's CEI plan for the provision of gateway services.[7] ALC filed an Application for Review of the Bureau Order.[8] ALC requests the Commission to reverse the Bureau's decision to permit Bell Atlantic to tariff only at the state level the basic services underlying the gateway service.[9]

III. DISCUSSION

4. ALC requests that the Commission require Bell Atlantic to file interstate tariffs for the interstate access services that would be used by the Bell Atlantic gateway.[10] ALC argues that the Commission has no policy of permitting "intrastate tariffing as a substitute for interstate tariffing of interstate services"[11] and that the Bureau has exceeded its delegated authority in its action. ALC contends that state tariffed CEI offerings are inconsistent with the tariffing requirements of section 203 of the Communications Act. ALC asserts that allowing the intrastate tariffing of interstate services contradicts the mandate in Title I of the Act[12] to centralize in the Commission regulatory oversight over

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[1] The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services, DA 88-1512, (1988) (Bureau Order).

[2] A list of commenters appears in Appendix A. We use the abbreviations in that appendix throughout this order.

[3] Amendment of Sections 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), CC Docket No. 85-229, Phase I, *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration Order*), *Phase I Order and Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*) *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *Phase II Order vacated* California v. FCC, 905 F.2d 1217; Computer III Remand Proceedings, CC Docket 90-368, *Report and Order*, 5 FCC Rcd 7719 (1990) (Order reinstating ONA obligations on the BOCs); Computer III Remand Proceedings: Bell Operating Company Safeguards; and Tier 1 Local Exchange Company Safeguards, Report and Order, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*) (Order allowing the BOCs to file CEI plans and CEI waivers during interim period between February 1, 1992 and removal of structural separation. The BOCs are also permitted to provide enhanced services on an integrated basis pursuant to the *Computer II* waivers granted by the Commission following the *California* decision), *pets. for recon. pending, pets. for rev. pending*, California v. FCC (9th Cir. Feb. 14, 1992) (No. 92-70083, consolidated on June 2, 1992 with MCI v. FCC, No. 92-70186, NY v. FCC, No. 92-70217, APNA v. FCC, No. 92-70261); California v. FCC (9th Cir. Feb. 21, 1992) (No. 92-70105, consolidated on June 2, 1992 with NYPSC v. FCC, No. 92-70281).

[4] Phase I Order, 104 FCC 2d at 1026, para. 129.

[5] *Id.* at 1036, para. 147.

[6] *Id.* at 1020, para. 115.

[7] Bureau Order, DA 88-1512 (1988).

[8] ALC Application for Review, DA 88-1512, filed October 31, 1988.

[9] Bell Atlantic filed a Motion to Strike ALC's reply comments arguing that the Commission did not solicit replies to opposition and that ALC's reply exceeded the Commission's five page limit. In the interest of a full and complete record, we deny Bell Atlantic's motion to strike, and include ALC's and Pacific Bell's replies in the record.

[10] ALC Petition at 1.

[11] *Id.* at 4.

[12] 47 U.S.C. § 151.

interstate communications.[13] Finally, ALC maintains that as a matter of policy, the Commission should prohibit state-tariffed CEI offerings because of the undue burden and expense imposed on Allnet in overseeing seven separate tariffs in seven jurisdictions.[14]

5. CEI plan filing requirements were devised as an interim procedure designed to allow BOCs expeditiously to offer specific enhanced services to the public, while we proceeded with the long-term process of approving and implementing ONA.[15] ONA service offerings are considered common carrier communication services and are subject to "dual jurisdiction," with federal tariffs for interstate access and state tariffs for intrastate services.[16] Pursuant to our *Part 69/ONA Order*, federal ONA tariffs were filed in November 1991, and took effect February 2, 1992.[17]

6. The Bureau found that the services that Bell Atlantic proposed for CEI in the plan for gateway services were either tariffed at the state level or were unbundled features of existing state offerings.[18] As such, the Bureau followed Commission precedent that advocates the use of existing offerings, including state tariffed offerings, as components of CEI/ONA.[19] For instance, the Commission previously encouraged "the use of existing basic services in CEI in order to expedite initial CEI development."[20] The Commission concluded that to facilitate its goals, CEI plans need not include federally tariffed services.[21] The Bureau has followed this Commission precedent on numerous occasions.[22] The courts, moreover, have sanctioned Commission acquiescence in state tariffing of certain intrastate services used in interstate communications.[23] The Bureau's decision to permit state level tariffs for the basic services underlying Bell Atlantic's interim CEI plan offerings was thus within its delegated authority and legally sound.

7. We additionally find that to reverse course and require the federal tariffing of CEI basic services would, in effect, nullify the interim nature of the CEI measures that were designed to facilitate the transition towards full implementation of ONA. Rather than frustrating the intent of the Communications Act, as ALC contends, we find that our use of CEI as an interim measure during ONA implementation has permissibly advanced the goals of the Communications Act and furthers the intent of Congress "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges...."[24]

8. Finally, we are not persuaded by ALC's argument of the undue burden imposed on Allnet in monitoring state access tariffs. ALC claims, for example, that the Bureau's decision requires Allnet to oversee in seven jurisdictions the rules and regulations of seven individual Bell Atlantic intrastate tariffs to ensure that the state tariffing arrangement is just and reasonable and nondiscriminatory. However, to the extent it is inconvenient, we find that burden to be outweighed by the public interest benefits of allowing CEI plans to go forward.[25] Moreover, any inconvenience has been short term, since these access services have now been tariffed in federal tariffs.[26]

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[13] ALC Petition at 6.

[14] ALC contends that Allnet Communications Services (Allnet), its interexchange interstate gateway subsidiary, would be responsible for monitoring state access tariffs. *See* ALC Application for Review at 6-7.

[15] *Phase I Order*, 104 FCC 2d at 1020, para. 115.

[16] Filing and Review of ONA Network Architecture Plans, (BOC ONA Recon Order), 5 FCC Rcd at 3089, para. 45 (1990); *Phase I Recon Order*, 2 FCC Rcd at 3054, para. 133. We reject the contention of Bell Atlantic and Pacific Bell that the CEI services in question are exclusively intrastate services. *See* Bell Atlantic's Opposition at 3; Pacific Bell and Nevada Bell Reply Comments at 2; ALC Reply at 4-6. Since the CEI services underlying Bell Atlantic's gateway service are provided in many multistate LATAs, end users in one state can use the CEI service to access the gateway or another enhanced service located in a different state in Bell Atlantic's region. Therefore, these CEI services can be utilized to originate and terminate interstate calls. *See also* Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, *Memorandum Opinion and Order*, FCC 92-18 at paras. 8-11 (adopted January 16, 1992).

[17] Open Network Architecture Tariffs, 7 FCC Rcd 1512 (1992) (ONA Investigation Order). Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524 (1991)(*Part 69/ONA Order*). The *Part 69/ONA Order* has integrated ONA tariffing policies, as modified in the *BOC ONA Order*, into existing federal access charge rules. Significantly, this Commission has decided to permit ESPs to continue to use state-tariffed access services for their interstate traffic. See *Part 69 /ONA Order*, 6 FCC Rcd at 4535, para. 60.

[18] Bureau Order at 5, para. 35.

[19] *Phase I Recon Order*, 2 FCC Rcd at 3068 n.261; *Phase I Further Recon Order*, 3 FCC Rcd at 1141, para. 46, 1148 n.93; *BOC ONA Recon Order*, supra at 3089 n.46.

[20] Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Service, Memorandum Opinion and Order, 3 FCC Rcd 1095 at 1098, para. 33 (1988) (Pactel Order); *Further Order*, 3 FCC Rcd 3552 (1988) (May 23 Order).

[21] Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Service, 3 FCC Rcd at 1103, para. 73 & n.114.

[22] *See, e.g.*, The Ameritech Operating Companies, Plan to Provide Comparably Efficient Interconnection to Providers of Enhanced Protocol Processing Services, 5 FCC Rcd 3231 (1990); The Bell Atlantic Telephone Companies, Plan for Comparably Efficient Interconnection of Electronic Data Interchange Service, 4 FCC Rcd 4758 (1989); The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Protocol Conversion Services, 4 FCC Rcd 2744 (1989); The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Voice Messaging Services, 3 FCC Rcd 5772 (1988).

[23] *See, e.g., Diamond Int'l Corp. v. FCC*, 627 F.2d 489 (D.C. Cir. 1980).

[24] 47 U.S.C. §151.

[25] ALC also argues that "the intrastate tariffing of interstate basic CEI services would be inconsistent with treating such services as interstate for separations purposes." ALC Reply at 6. ALC states that this tariffing arrangement would result in the interstate jurisdiction subsidizing the state jurisdictions "because the costs for these services would be picked up by the remaining interstate services....while the revenue for CEI services is applied to other intrastate services." ALC Reply at 6. We find that ALC has failed to substantiate its allegations of improper cost/revenue assignment and, therefore, we reject ALC's argument. In any event, we find that, on balance, any such risk in this area has been a short-term one and was outweighed by the benefits of implementing the CEI plan on an interim basis.

[26] Bell Atlantic has filed ONA tariffs or has been granted a waiver of the federal tariffing requirements for all of its Gateway CEI plan basic services. *See*, Bell Atlantic ONA Filing, Transmittal No. 471, filed 11/1/91. Local Business Exchange Service, 800 Service, Message Desk Service, Public Data Net-

IV. ORDERING CLAUSES

9. IT IS HEREBY ORDERED, that the application for review filed by ALC Communications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PARTY FILING APPLICATION FOR REVIEW

The ALC Communications Corporation (ALC)

PARTY FILING OPPOSITION TO APPLICATION FOR REVIEW

The Bell Atlantic Telephone Companies (Bell Atlantic)

PARTIES FILING REPLY COMMENTS

ALC

Pacific Bell and Nevada Bell (Pacific Bell)

PARTY FILING MOTION TO STRIKE

Bell Atlantic

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work Service, One Number Service. *See* Transmittal No. 471, Lineside Basic Serving Arrangement, § 6.3.1(A) p. 179.10-179.15; 800 Access Service, § 6.3.2.4 p. 179.35-179.36; Messaging Service Interface, § 6.4.1(AG) p. 189.5-189.6; Public Data Network Service, § 16. *See* Amendments of Part 69 of the Commission's Rules Relating to the Creationof Access Charge Subelements for Open Network Architecture: Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 7 FCC Rcd 813, at para. 15 (1992) (granting Bell Atlantic's petition for waiver of the federal filing requirements for One Number Service).

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC.
Bay Shore, New York

File No. BPH-850712GV

et al.

For a Construction Permit for a
new FM Station on Channel 276 at
Bay Shore, New York

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1992; Released: October 28, 1992

By the Commission:

1. Before the Commission for consideration is a Memorandum Opinion and Order, *Warren Price Communications, Inc.*, 7 FCC Rcd 4344 (1992), a Petition for Reconsideration filed August 10, 1992 by Long Island Music Broadcasting Corporation (LIMBC), and an Opposition filed August 20, 1992 by Shore Media, Inc.

2. LIMBC is requesting reconsideration of an order denying reconsideration. A second petition for reconsideration is not contemplated by the rules and may be dismissed as repetitious.[1] *United Broadcasting Co. of Florida, Inc.*, 39 RR 2d 448, 450 (1976); 47 C.F.R. § 1.106(k)(3). Moreover, LIMBC has not established a basis for reconsideration by either alleging new facts or changed circumstances which arose after LIMBC's last opportunity to present such matters, or by alleging facts which were unknown and could not have been discovered through the exercise of ordinary diligence. 47 C.F.R. § 1.06(b)(2). Finally LIMBC's arguments were previously considered and rejected by the Commission and it is well established that reconsideration will not be granted to debate matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964) *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1964).

3. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed August 10, 1992 by Long Island Music Broadcasting Corporation IS DISMISSED.

[1] In view of LIMBC's continued assertion of previously raised contentions, it is appropriate to note that "there must be some finality to the administrative process; and, absent extraordinary circumstances, the Commission's decision on petition for reconsideration exhausts a party's administrative remedies. If this were not the case, we would be involved in a never ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion." *VHF Drop-Ins*, 3 RR 2d 1549, 1551 n.3 (1964), quoting *Atlantic City Broadcasting Company*, 21 RR 194a (1961).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SPRINT COMMUNICATIONS COMPANY, L.P.	File No. I-T-C-92-209
Application for authority to acquire and operate facilities for service to Iceland.	
Application for authority to acquire and operate facilities for service to Yemen.	File No. I-T-C-92-210
Application for authority to acquire and operate facilities for service to Cyprus.	File No. I-T-C-92-212
Application for authority to acquire and operate facilities for service to Macao.	File No. I-T-C-92-213

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 20, 1992; Released: October 29, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Iceland, Yemen, Cyprus and Macao[1] by Sprint Communications Company, L.P. (Sprint).

2. Accordingly, IT IS ORDERED that application File Nos. I-T-C-92-209, I-T-C-92-210, I-T-C-92-212 and I-T-C-92-213 ARE GRANTED, and Sprint is authorized to:

a. lease from Comsat and operate one 2-Mbps IDR carrier (30 circuits) between the Shenandoah, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar facilities between the satellite and an earth station in Iceland furnished by Sprint's correspondent in Iceland;

b. lease and operate the necessary earth station capcity in the Shenandoah earth station;

c. use the facilities in a and b above to provide Sprint's regularly authorized services between the U.S. and Iceland;

d. lease from Comsat and operate one 2-Mbps IDR carrier (30 circuits) between the Beeline, Florida earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar facilities between the satellite and an earth station in Yemen, furnished by Sprint's corespondent in Yemen;

e. operate the necessary earth station capacity in the Beeline earth station;

f. use the facilities in d and e above to provide Sprint's regularly authorized services between the U.S. and Yemen;

g. lease from Comsat and operate 24 voice-grade circuits between Shenandoah, Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar facilities between the satellite and an earth station in Cyprus, furnished by Sprint's correspondent in Cyprus;

h. lease and operate the necessary earth station capacity in the Shenandoah earth station;

i. use the facilities in g and h above to provide Sprint's regularly authorized services between the U.S. and Cyprus;

j. lease from Comsat and operate eight voice-grade circuits between the San Ramon, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar facilities between the satellite and an earth station in Macao, furnished by Sprint's correspondent in Macao; and

k. operate the necessary earth station capacity in the San Ramon earth station; and

l. use the facilities in j and k above to provide Sprint's regularly authorized services between the U.S. and Macao.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to the communications satellite system.

[1] In its applications Sprint requests authority to acquire and operate facilities for the provision of common carrier services between the United States and Iceland, Yemen, Cyprus and Macao and points beyond. We note that should Sprint obtain any interest in facilities beyond Iceland, Yemen, Cyprus and Macao for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for Sprint to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Sprint and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that Sprint may not -- and Sprint's tariff must state that Sprint's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

6. IT IS FURTHER ORDERED that neither Sprint nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Sprint or any persons or companies controlling or controlled by Sprint are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.01(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petition for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELTRUST, INC.	File No. I-T-C-92-205
Application for authority to operate as an international resale carrier.	
USA PAYPHONE SYSTEMS	File No. I-T-C-92-207
Application for authority to operate as an international resale carrier.	
INTERNATIONAL TELECOMMUNICATIONS EXCHANGE CORP.	File No. I-T-C-92-208
Application for authority to operate as an international resale carrier.	
USTEL, INC.	File No. I-T-C-92-214
Application for authority to operate as an international resale carrier.	
OPERATOR SERVICE CO.	File No. I-T-C-92-217
Application for authority to operate as an international resale carrier.	
CARIBBEAN TELECOMMUNICATIONS, INC.	File No. I-T-C-92-218
Application for authority to operate as an international resale carrier.	
TELEDEBIT, L.P.	File No. I-T-C-92-220
Application for authority to operate as an international resale carrier.	

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 20, 1992; Released: October 29, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public on a resale basis by Teltrust, Inc. (TI), USA Payphone Systems (Payphone), International Telecommunications Exchange Corp. (INTEX), UStel, Inc. (UStel), Operator Service Co., (OSC), Caribbean Telecommunications, Inc. (Carib Tel) and Teledebit, L.P. (TeleDebit).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-92-205, I-T-C-92-207, I-T-C-92-208, I-T-C-92-214, I-T-C-92-217, I-T-C-92-218 and I-T-C-92-220 ARE GRANTED; and

a. TI is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1, between the U.S. and international points listed in those tariffs;

b. Payphone is authorized to provide international switched voice service by the resale of the international switched voice service set forth in MCI's Tariff F.C.C. No. 1 between the U.S. and international points listed in that tariff;

c. INTEX and OSC are authorized to provide international switched voice service by the resale of the international switched voice service set forth in Advanced Telecommunications Corp.'s Tariff F.C.C. No. 2, AT&T's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 3, Litel's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, Metromedia's Tariff F.C.C. No. 2, US Sprint's Tariffs F.C.C. Nos. 1 and 2, and WilTel's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs;

d. UStel is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and international points listed in those tariffs;

e. Carib Tel is authorized to provide international switched voice service by the resale of the international switched voice service set forth in St. Thomas and San Juan Telephone Co.'s Tariff F.C.C. No. 1 between the U.S. and the international points listed in that tariff; and

f. TeleDebit is authorized to provide international switched voice service by the resale of the international switched voice service set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, C&W's Tariff F.C.C. No. 1 and WilTel's Tariff F.C.C. No. 2 between the U.S. and international points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicants seek authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC. File No. I-T-C-92-191

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services of other common carriers to provide switched voice service to specific international points

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 15, 1992; Released: October 29, 1992

By the Chief, International Facilities Division:

1. The captioned application, filed June 12, 1992, by Cable and Wireless Communications, Inc. (CWCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariff F.C.C. Nos. 1 and 2 for the provision of international switched voice service between the United States and three countries listed in Appendix A and ships in the Atlantic Ocean Region (AOR), the Pacific Ocean Region (POR), and Indian Ocean Region (IOR). The application was placed on public notice on June 17, 1992. No comments were received.

2. CWCI is a common carrier authorized to provide switched voice services on a resale basis to numerous international points. CWCI is a wholly-owned subsidiary of Cable and Wireless PLC, a public limited company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. As such, CWCI is a foreign-owned carrier as defined in the Commission's *International Competitive Carrier* decision, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of all international common carrier services between the United States and international points.

3. As a dominant carrier in its provision of international common carrier services, CWCI remains subject to traditional entry and rate regulation. Our Section 214 authorizations to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier's tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorization must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorization, or, as here, serve additional points set forth in the underlying carriers' tariffs but not specified in the reseller's existing Section 214 authorizations.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by CWCI between the United States and the points listed in Appendix A to this decision.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-92-191 IS GRANTED, and CWCI is authorized to provide international switched voice by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the countries listed in Appendix A and ships in the AOR, IOR and POR.

6. IT IS FURTHER ORDERED that the applicant shall file copies of any necessary operating agreements entered into by itself or its parent/affiliate with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that CWCI shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries CWCI is authorized to serve within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file separate Section 214 applications to resell tariffed switched services to any additional points not covered in this order.

10. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. IT IS FURTHER ORDERED that neither the applicant nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicant or any persons or companies controlling it or controlled by it are parties.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

Country/Destination	**Carrier(s)**
Atlantic Ocean region	MCI, Sprint,[1]
Indian Ocean Region	MCI, Sprint
Pacific Ocean Region	MCI, Sprint
Vietnam	MCI, AT&T, Sprint
Cambodia	Sprint
Lebanon MCI,	AT&T, Sprint

[1] *See* Sprint Tariff F.C.C. No. 1, 60th revised page 6, 53rd revised page 6.1, and 8th revised page 6.1.1. *See also* MCI's Tariff F.C.C. No. 1, 23rd revised page 38.2.3.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

CENTEL VIDEOPATH, INC. File No. 2210-DSE-TC-92

For Transfer of Control of Earth
Station Authorization in the Domestic
Fixed-Satellite Service

ORDER

Adopted: October 26, 1992; Released: October 29, 1992

By the Chief, Domestic Facilities Division:

1. Centel Videopath, Inc. has requested that the pleading cycle with regard to its application for the transfer of control of Earth Station E873877 from Centel Corporation to Sprint Corporation, File No. 2210-DSE-TC-92, be modified to coincide with the pleading cycle for the transfer application that is pending in the Mobile Services Division.

2. We agree that consolidating the filing deadlines would be helpful and will not delay action on the earth station application. Therefore, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, the date for filing comments on or petitions regarding application File No. 2210-DSE-TC-92 is extended until **November 30, 1992.** In addition, the date for filing replies to the November 30 filings is extended until **December 13, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Walter Communications, Inc. — File No. 15670-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service station on the E-group channel at Duluth, Minnesota

ORDER ON RECONSIDERATION

Adopted: October 19, 1992; Released: October 29, 1992

By the Chief, Domestic Facilities Division:

1. This matter concerns a petition for reconsideration of the dismissal by the Domestic Facilities Division (the Division) of the application of Walter Communications (Walters) Inc., to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channel at Duluth, Minnesota and for reinstatement of the application. For the reasons discussed below, we deny the petition.

I. BACKGROUND AND CONTENTIONS

2. As the result of a Commission lottery, held on January 30, 1987, Walters' application was selected for qualification review. Subsequently, the Division initiated a qualification review of the application pursuant to Section 21.32 of the Commission's Rules, 47 C.F.R. § 21.32. Upon examination, the application was found to contain several deficiencies that precluded the staff from making a finding that Walters was legally, technically, financially, and otherwise qualified to be a licensee, and that a grant of the application would serve the public interest. By letter dated March 4, 1987, Walters was notified of these deficiencies[1] and provided an opportunity to cure them within thirty (30) days of the date of the letter.

3. Pursuant to Sections 21.13(c), 21.20(d) and 21.28(d) of the Commission's Rules, 47 C.F.R. §§§ 21.13(c), 21.20(d), and 21.28(d) and by letter dated January 22, 1988, the Division dismissed, without prejudice, Walters' application for failure to comply in a timely manner with its request for information.

4. On February 15, 1988, Walters submitted a petition for reconsideration of the Division's dismissal action. Walters maintains that reinstatement of the application would be in the public interest because it has substantially complied with the staff's request for information by curing most of the outstanding deficiencies.

II. DISCUSSION

5. As of the date of the Division's deficiency letter, March 4, 1987, and almost one year later, Walters still had not submitted the information necessary for evaluation of its qualification to be an MMDS licensee. For example, Walters had not submitted a lease, lease option agreement, or other "concrete evidence" to demonstrate the availability of its proposed transmitter site as required by Section 21.15(a), 47 C.F.R. § 21.15(a).[2] For MMDS applications subject to the Commission's lottery proceedings, a demonstration of reasonable assurance of site availability is sufficient prior to lottery. However, once the lottery is held, a license will not be granted until a fully-executed lease, option agreement or, other concrete evidence of site availability is submitted. *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713, 5721 (1987). Thus, Walters' statement that a site was available in 1983, when it submitted its application, did not satisfy the requirement that "concrete evidence" of the availability of its proposed transmitter site be submitted after the lottery date.

6. In addition, Walters failed to submit the required current financial qualification demonstration by April 4, 1987.[3] Also, Walters failed to comply with the request to submit a Section 21.902(i) non-interference analysis. Section 21.902(i) requires MMDS applicants to submit, prior to receiving a construction authorization and at such time as the Commission requests, an analysis demonstrating that the proposed MMDS facilities will not cause harmful interference to existing co-channel or adjacent channel Instructional Television Fixed Service (ITFS) receiver locations within fifty (50) miles of the MMDS transmitter, or alter-

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[1] The deficiencies cited were the absence of: (1) a signed lease or option to lease agreement, pursuant to 47 C.F.R. § 21.15(a); (2) current financial data, pursuant to 47 C.F.R. § 21.17(b); (3) a public interest statement, pursuant to 47 C.F.R. § 21.23(a)(4); (4) non-affiliation statement, pursuant to 47 C.F.R. §§ 21.900, 21.903(b)(1) and 21.903(b)(2); (5) antenna structure heights in agreement with FCC records; (6) the answers to questions on FCC Form 435 pages 5, 6 and 7; and (7) an analysis demonstrating that the proposed facility will not cause any harmful intereference to existing co-channel or adjacent channel ITFS receiver locations.

[2] Section 21.15(a) provides, *inter alia:* "Applicants proposing a new station location... shall indicate whether the station site is owned. If it is not owned, its availability for the proposed radio station site shall be demonstrated. Under ordinary circumstances this requirement will be considered satisfied if the site is under lease or under written option to buy or lease..." Walters presents no argument as to why it should be exempted from "ordinary circumstances" treatment, which would require by the terms of this rule provision that a lease or written option to buy or lease be submitted. In addition, Walters was required pursuant to Section 21.13(c) to submit a lease or option agreement after Division staff stated in the March 4, 1987 letter that a lease or option agreement was required for qualification review purposes and requested Walters to submit it. Section 21.13(c) provides, *inter alia:* "In addition to the general application requirements of §§ 21.13 through 21.17 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact... (2) As the Commission, at any time after the filing of an application... may require from any applicant... to enable it to determine whether a radio authorization should be granted."

[3] We note that a financial certification was submitted on March 1, 1988, after the dismissal of Walters' application.

natively, an "interference-acceptance" statement from the affected ITFS licensee. By the express language of this rule, an MMDS applicant must submit a non-interference analysis at such time as the Commission requests it. Despite the specific request that this analysis be submitted by April 4, 1987, Walters failed to do so. *See Fortuna Systems Corp.*, 3 FCC Rcd 5122, 5123 (Comm. Car. Bur. 1988).

7. Walters had a duty to submit all curative amendments to its application, as directed by the Division, no later than April 4, 1987 or seek an extension of time. *VisionAire, Inc.*, 5 FCC Rcd 1952 (Comm. Car. Bur. 1990). Its failure to submit curative amendments for almost one year substantially impeded the expeditious offering of MMDS in Duluth. In view of the foregoing, dismissal of this application for failure to comply with the Division's requests for information was proper, reconsideration of that action is not warranted, and reinstatement is not justified.

III. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Walter Communications, Inc., regarding its Duluth, Minnesota MMDS application is denied.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, Inc.

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire, on an IRU Basis, and Operate Capacity in the UK-GER 5 Cable System for the Rendition of its Authorized Services to Germany and Switzerland.

File No. I-T-C-92-192

ORDER AND AUTHORIZATION

Adopted: October 15, 1992; Released: October 29, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed by CICI, Inc. (CICI), pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS ORDERED that application File No. I-T-C-92-192 IS GRANTED and CICI is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, and operate a half-interest in one Minimum Investment Unit (MIU)[1] of capacity from Deutsche Budespost Telekom (DBP-T) in the UK-Germany 5 cable system (UK-GER 5) to extend its TAT-9[2] circuits from the United Kingdom to Germany;

b. lease a half-interest in ten 64-Kbps equivalent digital circuits, on an administrative lease basis, from DBP-T and Swiss PTT as appropriate facilities for the extension of TAT-9 circuits from the United Kingdom to Switzerland, via Germany;

c. activate capacity in the UK-GER 5 cable system and the aforementioned extension facilities for the provision of its authorized telecommunications services between the United States and Germany and Switzerland.

2. IT IS FURTHER ORDERED that CICI may not -- and CICI's tariff must state that CICI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Germany and Switzerland afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending.*

3. IT IS FURTHER ORDERED that neither CICI nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangment to which CICI or any persons or companies controlling or controlled by CICI are parties.

4. IT IS FURTHER ORDERED that CICI shall file copies of any operating agreement entered into by itself or its parent/affiliate with its correspondents within 30 days their execution.

5. IT IS FURTHER ORDERED that CICI shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries it is authorized to serve within 90 days from the end of each calendar quarter.

6. IT IS FURTHER ORDERED that CICI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this decision.

7. IT IS FURTHER ORDERED that CICI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Communications Act, 47 C.F.R. §43.61.

8. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] A MIU is defined as 30 64-Kbps channels. CICI will pay a sum of approximately $55,100 for one half-MIU.

[2] TAT-9 Cable System, 4 FCC Rcd 1129 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

ORDER EXTENDING TIME FOR FILING COMMENTS

Adopted: October 19, 1992; Released: October 20, 1992

New Comment Date: November 16, 1992
New Reply Comment Date: December 16, 1992

By the Office of Engineering and Technology:

1. On October 9, 1992, the Association for Maximum Service Television, Inc. (MSTV) filed a motion requesting an extension of the time for filing comments and reply comments in response to the *Second Further Notice of Proposed Rule Making* (*Second Further Notice)* in the above captioned proceeding.[1] The *Second Further Notice* addresses proposals and issues relating to the allotment and assignment of conversion channels for advanced television (ATV) service. Comments and replies in response to the *Second Further Notice* currently are due November 2, 1992, and December 2, 1992, respectively. MSTV asks that these dates be extended fourteen days, with comments due November 16, 1992, and replies due December 16, 1992.

2. In its request, MSTV indicates that it is again undertaking the task of coordinating and preparing joint broadcaster comments to address the critical allotment/assignment issues raised in the *Second Further Notice*. MSTV indicates that the demands of providing data relating to spectrum use implications to the FCC Advisory Committee on Advanced Television Service have placed extraordinary demands on the MSTV personnel and computer resources. It further indicates that current deadline for filing comments coincides with a long-scheduled meeting of its board of directors that will require active preparation and participation by the same MSTV staff and counsel. MSTV states that the requested additional time is necessary to enable it to avoid this scheduling conflict and prepare joint comments on behalf of the Broadcast industry.

3. We recognize the significance of the industry coordination effort that MSTV is undertaking and the benefits of that effort to the important and complex issues involved in the allotment and assignment of ATV conversion channels. We support this undertaking and believe it is desirable to encourage its success. To this end, the FCC staff involved in the development of ATV allotment and assignment policy are now coordinating with the MSTV staff involved in this project on a regular basis to exchange information on these issues and to provide MSTV with assistance wherever possible. We further recognize the demands faced by MSTV in preparing and coordinating broadcast industry comments responding to the *Second Further Notice*. We believe an extension of the time for filing comments and replies as requested by MSTV will further the development of the record on the ATV allotment and assignment policy issues. This action will not affect our schedule for final action on the ATV Table of Allotments.

4. Accordingly, IT IS ORDERED THAT the date for filing comments in response to the *Second Further Notice of Proposed Rule Making* in MM Docket No. 87-268 IS EXTENDED to **November 16, 1992.** IT IS FURTHER ORDERED that the date for filing reply comments IS EXTENDED to **December 16, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

[1] *See Second Further Notice of Proposed Rule Making,* MM Docket No. 87-268, FCC 92-332, released August 14, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 15, 1992

PRELIMINARY POLITICAL PROGRAMMING AUDIT RESULTS

The Communications Act of 1934 and the Commission's rules impose special obligations on broadcasters and cable operators with respect to the sale of time to candidates for political office. Included among these are requirements that the candidates be afforded "equal opportunities" and be charged, during a specified pre-election period, no more than the "lowest unit charge" for the same class and amount of time as the most favored commercial advertisers are charged. Federal candidates are also entitled to be afforded "reasonable access" to broadcast stations for the presentation of programming.

In July of 1990, the Commission's staff began an audit of the performance of thirty radio and television stations to assess compliance with these requirements. Following up in part on the results of this audit, the Commission undertook a comprehensive review of its political programming policies. Revised rules and policies based on this review went into effect in January 1992. *Codification of Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992). In June 1992, a new audit of twenty-eight broadcast stations and two cable systems in ten cities was initiated.

The preliminary findings indicate that the Commission's efforts since the 1990 audit to ensure compliance with our political programming rules are having a positive effect. The Mass Media Bureau's analysis of the information collected indicates that most of the audited entities have made genuine efforts to comply with the revised rules and policies. There has been a particularly significant increase in important information about sales practices being provided to candidates as a result of the affirmative disclosure requirement. Preliminary results from the audit indicate that 24 of the 30 audited entities have complied with the basic requirements of the rules that were the subject of the audit. The Commission's staff is continuing to review the 6 remaining cases, involving 4 broadcast stations and 2 cable systems.

The 1992 audit focused solely on two specific obligations: 1) the obligation to disclose to candidates pertinent information regarding advertising sales practices, a requirement designed to ensure that candidates are informed about the various discount privileges and rate options they are entitled to under the law, and 2) the obligation to maintain a "political file," in which requests for political advertising time and the disposition of such requests must be noted. The 1992 audit did not seek to ascertain information about specific sales to candidates. Cable systems were also added to this audit because candidates appear to be using cable for advertising to a far greater degree than in past elections.

As indicated, the Bureau's preliminary analysis of the information collected indicates substantial compliance by most entities audited with the disclosure and political file requirements. The analysis nonetheless suggests that there is a continuing need for attention to and improvement in certain areas. As to the disclosure obligation, the Bureau stresses the following:

(1) Candidates must be informed of the specific attributes, beyond just rates, of the various classes of time offered to commercial advertisers. In other words, stations and systems should describe what differentiates various classes of time from each other (such as time-sensitive make goods or priorities against preemption) to enable political advertisers to make informed choices.

(2) Candidates must be informed about how preemptible time is sold. Candidates also must be informed, if a station or system sells preemptible time on an auction basis, of the availability of demand-generated intermediate preemptible rates if such rates are available to commercial advertisers. When commercial advertisers are told that the "current selling level" or other type of "going" or "market" preemptible rate carries virtually no or little risk of preemption, this information must be disclosed to candidates.

(3) Candidates must be informed of the likelihood of preemption for the class or classes of preemptible time available to commercial advertisers. Although an estimated percentage of preemption probability may not always be required or possible, the station's or system's explanation must convey a reasonably precise gauge of the likelihood of preemption. Candidates must be able to make informed decisions about the class of time that will provide them with the most acceptable risk of preemption.

(4) Broadcasters and cable systems that inform candidates that orders for political time will not be considered firm until the candidate has provided a net cash-in-advance payment are reminded that Commission policy states that federal candidates need not pay more than one week in advance, and that candidates must be extended credit in the same manner and according to the same policies applicable to similarly situated commercial advertisers. *Beth Daly*, 7 FCC Rcd 1442 (MMB), *recon. denied*, FCC 92-364 (released August 14, 1992). Candidates should be informed of these rights, and stations and cable systems should review their payment policies to ensure that they comply with these requirements.

(5) Broadcasters must provide reasonable access to federal candidates once a campaign is in "full swing." *CBS, Inc. v. FCC*, 629 F.2d 1, 15 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981). Although there is a presumption that a campaign is in full swing during the statutory 45- and 60- day periods for the lowest unit charge during the primary general elections, the campaign may actually start prior to these time periods.Stations should keep these requirements in mind when disclosing to federal candidates their policies for reasonable access for legally qualified candidates.

(6) While broadcasters and cable systems are required to inform candidates about the various package plans that are available to commercial advertisers, and that candidates are entitled to negotiate such packages, stations/systems are reminded that they must also include rates found in packages in their calculation of lowest unit charge for each class of time that is included in any package. In addition, stations/systems are reminded that candidates can no longer be required to purchase a pro-rata portion of any package plan to obtain package plan rates.

With respect to political files, the Bureau suggests that broadcasters and cable operators should pay particular attention to ensuring that the files contain the following:

(1) Information showing when contracted-for advertising actually aired; we note that in *Codification of Political Programming Policies*, 7 FCC Rcd 4611 (1992), issued after the audit commenced, the Commission stated that a station could meet this requirement by noting in the file that such information is available and by making this information available promptly upon request.

(2) A clear indication of the class of time purchased by the candidates, including an explanation of any codes used to identify class of time on contracts, invoices, or program logs.

(3) All request forms, contracts, and/or invoices organized by candidates and election.

(4) The political file must be maintained in a neat and organized manner that is easy to understand so that candidates examining the file can readily obtain the information to which they are entitled. The file should be organized in a recognizable scheme, such as by date or alphabetically by candidate.

Broadcasters and cable operators are reminded that the above examples of issues raised by the audit are not exhaustive of the disclosure and political file obligations. Recent changes in the Commission's rules as well as in industry selling practices make it particularly important that broadcasters and cable system operators familiarize themselves and maintain a current understanding of *all* of the requirements in this area, and we urge them to carefully review the Commission's political programming rules and interpretive rulings.

Questions regarding the audit and the required elements of disclosure and political files, or any other aspect of the political programming laws, should be directed to the Political Programming Branch at (202) 632-7586.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 16, 1992

Released: October 23, 1992

Mr. Kenneth Bates 8210-AJZ
Director, Office of Media 92030580
and Telecommunications 92020940
Board of Education of the
City of New York
Licensee, Noncommercial
Station WNYE-TV
112 Tillary Street
Brooklyn, New York 11202

Dear Mr. Bates:

This is in reference to the Commission's investigation into allegations that the Board of Education of the City of New York, licensee of television station WNYE-TV, New York, a noncommercial station, may have aired "advertisements" in violation of Section 399B of the Communications Act and Section 73.621(e) of the Commission's Rules. Section 399B(b)(2) states "No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement."

On January 21, 1992, we sent you a letter of inquiry regarding WNYE-TV's broadcast of several Korean-language donor underwriting announcements which it appeared might be advertisements in conflict with the above mentioned provisions of the Communications Act and the Commission's Rules. We asked for your comment on a translation of the announcements, as well as a description of the station's general policies regarding the review and approval of underwriting announcements.

You responded that the announcements in question were aired during the 90 minutes per day of Korean Cultural Television (KCTV) programming, but dispute the Commission's text of the announcements and provide you own translation. You also describe the station's double-level review for the Korean-language announcement, which has included consultation with the Public Broadcasting Service, FCC counsel, and the rejection of underwriting announcements that contain comparative or qualitative language or that appear too promotional.

The Communications Act and Commission rules prohibit advertising over the facilities of public broadcasting stations but permit donor and underwriting acknowledgements. The Commission has deliberately not established rigid regulations or guidelines in this area but has indicated that it would rely heavily on the good faith judgments of public broadcasters. However, the Commission has set forth some general guidelines as to the distinctions between promotional announcements or advertisements and underwriting acknowledgments by contributors of funds to stations. *See Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 97 FCC 2d 255 (1984)("1984 Public Notice") and *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 7 FCC Rcd 827 (1991)("1986 Public Notice Excerpts"). Briefly, the guidelines permit underwriter acknowledgments to include "(1) logograms or slogans which identify and *do not* promote, (2) location information, (3) value neutral descriptions of a product line or service, and (4) brand and trade names and product or service listings." Permitted are company slogans "which contain general product-line descriptions . . . if not designed to be promotional in nature" as are "visual depictions of specific products." Acknowledgements are to be made for identification purposes only and should not include "qualitative or comparative language" or be "promotional" in nature.

Our review of video tapes of announcements made during KCTV programming as well as your response to our letter of inquiry, indicate problems in WNYE-TV's compliance with Section 399B's restrictions in that certain of your announcements appear to be promotional in nature and to exceed the established underwriter acknowledgement guidelines.

First, taking into account your translation of the underwriting announcements, we find that two of the announcements, by virtue of the language used, are promotional in nature. The Han-Yang Supermarket announcement concludes with the phrase "We provide pleasure in convenience and the wisdom of thrift." This indicates a type of savings or discount associated with the store, constituting prohibited price information. *1984 Public Notice* at 263; *1986 Public Notice Excerpts*, 7 FCC Rcd at 828. The AT&T announcement recites that AT&T is a company "Providing quick connection and clear sound bringing you closer to Korea, for international long distance service." This involves a prohibited qualitative description of the donor's product, implying that the connection is quicker and the sound is clearer than that of the competition. *1986 Public Notice Excerpts*, 7 FCC Rcd at 827. *See also Notice of Apparent Liability to Radio Station WBHL*, 7 FCC Rcd 5123 (MMB 1992) (descriptors such as "reliable," "excellent," and "dependable" are qualitative).

Further, our review of two videotapes of WNYE-TV's broadcast of KCTV programming provided by the complainant from the fall of 1991, and February 27, 1992, reveals that the video portion of nine announcements, as demonstrated in the discussion below, contain "qualitative" information and "calls to action," suggesting that the announcements are promotional in nature rather than underwriting acknowledgements, and thus violate the Section 399B prohibition on advertising by noncommercial stations. The video portion of these announcements -- Non-No, Vege-Meal, Han-Yang Supermarket, Dae Han Printing, Sae Ro Na Travel, Korean Daily News, Four Seasons Health Spa and Hair Solon, New York Golf Center, and Noodle Eatery -- by emphasizing in the imagery broadcast the demonstration, use, or consumption of commercial products or patronage of places of business, invite viewer purchases and present a qualitative message as to the product or business in question. As such, they are essentially indistinguishable from commercial advertisements.

Each of these announcements consists of at least five different views of the product in various different uses, or interior and exterior shots of a business, its employees, and/or patrons. For example, in Vege-Meal, a split screen shows 10 different views of various apparently satisfied

Vege-Meal drinkers in several contexts; the Non-No announcement shows a montage of approximately 12 different views of a day in the life of a woman, presumably wearing with satisfaction various different Non-No outfits.

Because identification is a key aspect of the enhanced underwriting policy, "visual depictions of specific products" are permitted, but visual announcements that dwell heavily on the qualitative aspects of a business or product exceed the function of identification. Commission policy allows visual depictions for purposes of identification -- not for publicizing product uses and qualities. Announcements employing conventional commercial advertising techniques intended to persuade, rather than merely identify, are promotional. Additionally, while the Commission has not adopted any quantitative guidelines on underwriting announcements, the longer an announcement takes to identify the underwriter, the more likely it is to be promotional. Although the separate PBS standards are not binding on the Commission, in light of your indication that you have consulted with PBS, it should be noted that the PBS guidelines, with certain limited exceptions, state that "products depicted in video should not be shown in use or in operation." PBS, "National Program Funding Standards & Practices," February 1990, at p. 23.

In the *1986 Public Notice*, FCC 86-161, released April 11, 1986, at p. 7, the Commission warned that licensees should pay particular attention to monitoring foreign language programming to assure that underwriting announcements are consistent with the Commission' rules and policies. Although WNYE-TV appears to have maintained some type of internal monitoring, which you acknowledge has improved since our inquiry, it did not suffice for purposes of compliance with the Commission's underwriting requirements.

Because the differentiation between underwriting announcements and advertisements based on the visual presentation of the underwriter's product or place of business is an area of some difficulty that has not been specifically addressed by the Commission subsequent to the adoption of its enhanced underwriting policy, we are bringing this matter to your attention so that corrective action can be taken and are not proposing any formal sanction be imposed on WNYE-TV at this time. WNYE-TV is cautioned to exercise greater care with respect to announcements like those for Han-Yang Supermarket and AT&T announcements, which included prohibited price information and qualitative terms, respectively, as discussed above.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 22, 1992

RECORD ON TOLL FRAUD TO REMAIN OPEN
99-File No. 93-Toll Fraud-01

On October 9, 1992, the Commission held an *En Banc* hearing on toll fraud where panelists gave oral presentations and submitted written testimony. The record associated with this hearing will remain open until **November 16, 1992.** Parties interested in filing additional comments should file an original and 5 copies of their additional comments with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, DC 20554. Participants wishing each Commissioner to receive a personal copy of their comments should file additional copies with each Commissioner's office. All comments must be captioned **"93-Toll Fraud-01."**

All comments captioned "93-Toll Fraud-01" will be available for public inspection by interested parties during regular business hours in the Common Carrier Bureau, Domestic Facilities Division Reference Room located at 2025 M Street, N.W., Room 6220. For additional information on how to file comments, parties may contact Linda Dubroof, Domestic Facilities Division, at (202) 634-1800.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request of Dial Page, L.P.
To Waive Sections 90.621(a)(iv),
90.621(b), 90.627, 90.631(e) and
90.631(f) of the Commission's
Rules to Operate a Wide-Area
800 MHz Digital Trunked SMR

ORDER

Adopted: October 16, 1992; Released: October 20, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 20, 1992

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On June 22, 1992, Dial Page, L.P. filed a request to waive the Commission's rules to implement a wide-area 800 MHz digital trunked Specialized Mobile Radio (SMR) system in nine southeastern States. This waiver request was placed on public notice, with comments due on or before September 30, 1992, and reply comments due on or before October 19, 1992.[1]

2. On September 25, 1992, the American Mobile Telecommunications Association, Inc. (AMTA) filed a request to extend its time to file comments until October 16, 1992, to permit its Board of Directors to consider the recommendations of AMTA's Regulatory Committee at its meeting scheduled for October 12-14, 1992. This request was granted by *Order* released September 30, 1992.

3. On October 15, 1992, the National Association of Business and Educational Radio, Inc. ("NABER") filed a request to further extend the time to file comments until November 16, 1992. NABER states that it will be holding its semi-annual Board of Directors and Council Meetings on October 23-24, 1992 and that the Dial Page Waiver Request as well as similar requests will be discussed at these meetings. Because of the volume of the requests which have been filed and their technical complexity, NABER further states that time consuming review is required. NABER argues that because it will be the only Specialized Mobile Radio industry representative organization filing comments in this proceeding, its comments will be helpful to the Commission. Dial Page did not concur in NABER's request.

4. For good cause shown, and because it will best conduce to the proper dispatch of Commission business,[2] we find that it is in the public interest to permit a limited additional time to file comments and reply comments.

5. ACCORDINGLY, pursuant to Sections 0.131, 0.331, and 1.46 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331 and 1.46, IT IS ORDERED that the time for filing comments in this matter is extended to on or before **October 30, 1992** and that the time for filing reply comments in this matter is extended to on or before **November 20, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division
Private Radio Bureau

[1] Public Notice, 57 Fed.Reg. 39684 (September 1, 1992).
[2] Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-420

In the Matter of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BPET-811118KF

Permittee of Noncommercial Educational Television Station KEEF-TV, Los Angeles, CA

Order to Show Cause Why the Permit of KEEF-TV Should Not Be Revoked and Notice of Apparent Liability for a Forfeiture

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BLET-870225KE

Permittee of KEEF-TV, Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BMPCT-870610KU

Permittee of KEEF-TV, Los Angeles, CA

For Consent to Modify Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC. — File No. BLET-870610KT

Permittee for KEEF-TV Los Angeles, CA

For License to Cover Construction Permit

In re Application of

BLACK TELEVISION WORKSHOP OF LOS ANGELES, INC.

Permittee of KEEF-TV Los Angeles, CA

For Special Temporary Authority

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1992; Released: October 30, 1992

By the Commission:

1. Before the Commission is an Appeal filed on May 6, 1992 by the Black Television Workshop of Los Angeles, Inc. (BTW)[1] challenging an April 29, 1992 bench ruling of Administrative Law Judge Joseph Chachkin (ALJ) permitting the testimony of Michele Moore, Esq.[2] Also before the Commission is an Application for Review and a Motion to

[1] The appeal was signed by attorney Stephen T. Yelverton, who in October 1988 filed a Notice of Appearance on behalf of BTW and four individuals associated with BTW. Administrative Law Judge Joseph Chachkin recently issued *Memorandum Opinion and Order*, FCC 92M-805 (released July 22, 1992), in which he indicated that Yelverton represents only the four individuals, not the corporate entity BTW. The instant appeal is entitled to consideration in either case. Though we refer to the pleading herein as the "BTW Appeal," such reference should not be construed as indicating either approval or disapproval of the ALJ's conclusion.

[2] The Mass Media Bureau filed an Opposition to BTW's Appeal on May 18, 1992. On May 22, BTW filed a Motion to Strike the Bureau's Opposition on the grounds that it was unresponsive and did not comply with the page limits set forth in 47 C.F.R. section 1.301(c)(7) (Opposition to an Appeal shall not exceed five pages). Because the Opposition was seven pages long and because the Bureau did not file a request to exceed the established page limitations, the Opposition was dismissed by the General Counsel's Office, subject to being refiled in proper form pursuant to 47 C.F.R. section 0.251(f)(9). *Order*, FCC 921-052, released June 11, 1992. The Bureau did not refile its pleading.

Stay both filed May 21, 1992 by Booker T. Wade (Wade). Wade seeks (i) review of a May 14, 1992 General Counsel's *Order*[3] which dismissed Wade's May 6 Appeal of the ALJ's bench ruling permitting Moore's testimony and (ii) a stay of this proceeding pending review of the General Counsel's *Order*.[4] On May 15, one day after release of the General Counsel's *Order*, Wade also filed a Notice of Appearance in this case.[5] For the reasons set forth below, we affirm the ALJ's *Order* permitting Moore's testimony and deny BTW's Appeal.[6] We also dismiss Wade's Application for Review and Request for Stay, as well as the May 15 Notice of Appearance.

2. *The BTW Appeal:* In its Appeal, BTW asserts that the ALJ erred in permitting Moore to testify at the April 29 hearing because Moore served as counsel to BTW and therefore the attorney client privilege precluded her testimony as to BTW's affairs.[7] BTW requests that the Commission strike all of Moore's testimony from the record, or, in the alternative, order that her testimony not be used against BTW. We conclude that BTW has not sustained its burden of demonstrating that the communications on which Moore was questioned during the hearing were privileged. Therefore BTW's request to strike Moore's testimony from the record or prohibit its use must be denied.[8]

3. The purpose of the attorney-client privilege is to encourage the open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications. *U.S. v. Noriega*, 917 F.2d 1543, 1550 (11th Cir. 1990) (subsequent history omitted); *U.S. v. Suarez*, 820 F.2d 1158, 1160 (11th Cir.), *cert. denied*, 484 U.S. 987 (1987). To invoke the privilege, however, the claimant must establish that he is or sought to become a client of the person to whom he made the communication he seeks to protect; that the person was a member of the bar (or a subordinate), acting at the time of the communication in his or her professional role as a legal advisor; that the communication was made for the purpose of securing a legal opinion or legal services and with the expectation of confidentiality; and that the privilege has not been waived by the client. *See, e.g., Noreiga*, 917 F.2d at 1550; *U.S. v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980). Moreover, the attorney-client privilege is not absolute. Because the privilege "serves to obscure the truth . . . it should be construed as narrowly as is consistent with its purpose." *Suarez*, 820 F.2d at 1160. Accordingly, blanket claims of privilege are generally disallowed; the privilege must be invoked on a question-by-question basis. *U.S. v. Lawless*, 709 F.2d at 487; *U.S. v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981); *see also Tri-State Community Development and Communications Corp.*, 4 FCC Rcd 2402 (Rev. Bd. 1989) (subsequent history omitted) (claims of privilege must be made with "particularity" and "precision").

4. In the instant case, BTW has not attempted to plead, much less to prove, the elements necessary to invoke the privilege with respect to the conversations between Michele Moore and individuals associated with BTW that were the subject of questioning during the hearing. Though stating that "Moore served as counsel to BTW in 1987"[9] BTW makes no effort to point to specific questions or answers from the hearing transcript that concern communications that were made to Moore during 1987 for the purpose of obtaining legal advice and with the expectation of confidentiality. Rather, BTW requests that we order either that *all* of Moore's testimony be stricken or, if the testimony is not striken, that *none* of it be used against BTW. The assumption on which this request is based -- that every conversation with Moore concerning the events that gave rise to this proceeding is protected, regardless of the time frame in which the conversation occurred or Moore's role vis-a-vis BTW during that time frame -- is clearly erroneous in light of the well-established standards for successful invocation of the attorney-client privilege. Moreover, BTW's failure to differentiate between communications it believes were made to Moore for the purpose of obtaining legal advice and other communications renders the appeal, under the circumstances of this case, virtually meaningless. Moore testified that her relationship with various people

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[3] FCC 92I-037, released May 14, 1992.

[4] The Mass Media Bureau filed an Opposition to Wade's Motion to Stay on June 2, 1992 and an Opposition to Wade's Application for Review on June 5, 1992.

[5] The Mass Media Bureau filed a Motion to Strike the Notice of Appearance on June 11, 1992. Wade filed an Opposition to the Motion to Strike on June 22, 1992.

[6] The Commission, not the Review Board, is now acting on appeals of ALJ rulings in this matter. *Order*, 7 FCC Rcd 2716, 2717 para. 6 (1992).

[7] BTW asserts that the ALJ "refused to entertain ... a claim [of attorney-client privilege]." Appeal at 1. In fact, the ALJ considered the claim repeatedly and ultimately rejected it on three grounds. First, he concluded that no attorney-client relationship existed between Moore and BTW because Moore worked for BTW as a consultant, not as a lawyer. Docket No. 88-420, Vol. 9, April 29, 1992 hearing transcript at 1257, 1302-1303, 1305-1306 (hereinafter "transcript"). He further concluded that, even if an attorney-client relationship existed, it could be asserted only by the original eight members of BTW's Board of Directors, and that a majority of that Board had submitted declarations waiving any claim of privilege. Transcript at 1260-1261. Finally, he determined that, even if attorney-client privilege could be asserted on behalf of individuals other than the original Board of Directors, including Wade, a party to the proceeding and counsel to BTW, Wade had himself waived the privilege by submitting various documents and statements to the Commission concerning the same events on which Moore was being questioned. Transcript at 1253-1254, 1285. We need not address these issues, or issues BTW raises regarding the propriety of waivers the Mass Media Bureau relied on in calling Moore to testify; BTW's failure here to assert the attorney-client privilege with the required degree of specificity mandates denial of its appeal in any event. *See* para. 4 *infra*.

[8] BTW asserts that the ALJ also erred in not permitting an appeal of his ruling prior to taking Moore's testimony. In support of this argument, BTW cites 47 C.F.R. section 1.301 (a)(2), which states that a presiding officer's ruling requiring testimony is appealable as a matter of right. However, section 1.301(a)(2) does not mandate an automatic stay of a proceeding pending such appeal. To the contrary, 47 C.F.R. section 1.301(a)(c) indicates that the presiding officer's rulings from the bench are effective when made, though "[t]he Commission *may* stay the effect of any ruling which comes before it for consideration on appeal" (emphasis added). Thus BTW's implication that a stay pending the appeal was mandatory is erroneous. BTW cites *Edwin A. Berstein*, 7 FCC Rcd 1492 (1992), to support its argument. While it is true that in that case the Review Board considered a challenge to an ALJ's ruling concerning the application of the attorney-client privilege to certain deposition testimony prior to the taking of the depositions, nothing in that case indicates that such prior review is mandatory.

[9] BTW Appeal at 1.

associated with BTW, including Wade, spanned at least eight years prior to her doing legal work for BTW in 1987 and continued after 1987, and that much of her knowlege of BTW's affairs stems from her personal or business relationships with Wade, not from any relationship as his or BTW's attorney.[10] Considering this clear testimony, and absent any specific contrary showing by BTW, the Commission must deny BTW's appeal.[11]

5. *Wade's Application for Review.* As stated, Wade's Application for Review seeks review of a May 14, 1992 General Counsel's *Order* and a stay of this proceeding pending such review. The General Counsel's *Order* dismissed Wade's May 6 pleading, which sought review of the ALJ's bench ruling permitting Moore's testimony and a stay of the proceeding pending review of that ruling.[12] The General Counsel's *Order* dismissed Wade's pleading on the grounds that (i) it was in violation of 47 C.F.R. section 1.52 because it was neither signed by an attorney of record nor, as is permitted in cases where a party is not represented by an attorney, verified by the party; and (ii) it was in violation of 47 C.F.R. section 1.44 (e) because it impermissably combined a Motion to Stay with an appeal of the ALJ's ruling. Wade maintains that the General Counsel's Office interpreted the rules it relied on in dismissing his appeal incorrectly. Nonetheless, on May 15, 1992, one day after release of the General Counsel's *Order*, Wade filed an Amended Certificate of Service and Notice of Appearance, maintaining in a cover letter that he is "acting as his own counsel" and, therefore, his own signature on the May 6 pleading was sufficient. On May 21, simultaneously with filing the Application for Review of the General Counsel's *Order*, Wade also filed a separate Motion to Stay. Thus, according to Wade, even assuming the reasons for dismissing his appeal were initially valid, he has mooted those reasons.

6. Wade cannot now properly assert his right of self-representation through the filing of a Notice of Appearance or through the filing of pleadings under his own name. As stated, on October 12, 1988, Stephen T. Yelverton, Esq. (Yelverton) filed a Notice of Appearance on behalf of BTW, Wade, Rosa Ware, Gwendolyn May, and Hope Smith.[13] Though Wade's May 15 letter states that he is acting as his own attorney, nothing in the record of this proceeding indicates that Wade has dismissed Yelverton or that Yelverton has withdrawn as counsel for Wade. This circumstance appears to be novel before the Commission, but in the federal courts it is well-established that the rights of self-representation and representation by counsel cannot both be exercised at the same time; a party seeking to assert his right of self-representation must clearly and unequivocally discharge any lawyer previously retained. *See, e.g., O'Reilly v. New York Times Co.*, 692 F.2d 863, 868 (2nd Cir. 1982); *United States v. Wolfish*, 525 F.2d 457, 462-63 (2nd Cir. 1975), *cert. denied*, 425 U.S. 1059 (1976). Wade has not met this requirement. Wade argues that Yelverton can represent Wade in his corporate capacity and Wade can represent himself simultaneously in his individual capacity. While the courts have permitted this bifurcated approach in circumstances where the interests of the corporation and the individual are not the same,[14] they have declined to permit it in circumstances where the interests are the same and the individual has expressed no dissatisfaction with retained counsel at earlier stages in the proceeding, as is the situation in this case.[15] *See United States v. Private Brands*, 250 F.2d 554, 556-557 (2nd Cir. 1957), *cert. denied*, 355 U.S. 958 (1957).[16]

7. Furthermore, even if Wade had properly discharged Yelverton or his interests were different from those represented by Yelverton, we would be compelled to dismiss Wade's Notice of Appearance and *pro se* pleadings because of his extreme untimeliness in asserting the right to self-representation and his failure to provide any explanation of the need to assert the right at this late point in the proceeding. While the right to self-representation is a right of high-standing,[17] it is "sharply curtailed" if not asserted on a timely basis. *O'Reilly* at 867; *United States v. Denno*, 348 F.2d 12, 15 (2nd Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966). Considerations in determining whether to grant an untimely request include the reasons for the request, the qualifications of the counsel previously representing the party, and the potential disruption to the proceedings. *O'Reilly* at 867-868; *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2nd Cir. 1976). This proceeding was initiated over three years ago, and in fact the ALJ recently issued an *Order* closing the record in the proceeding and establishing dates for submitting proposed findings of fact and conclusions of law.[18] Yelverton has represented Wade during the entirety of the proceeding, and, as stated, there has been no indication by Wade that the representation has been inadequate. In light of these facts, and in light of Wade's failure to disassociate himself from Yelverton, Wade's Notice of Appearance, together with all pleadings filed by him on a *pro se* basis, must be dismissed.

8. ACCORDINGLY, IT IS ORDERED, That the May 18, 1992 Appeal of Administrative Law Judge Joseph Chachkin's bench ruling permitting Michele Moore's testimony, filed by Black Television Workshop of Los Angeles, Inc. IS DENIED.

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[10] Transcript at 1284, 1308.

[11] BTW raises various other complaints about the Bureau's actions in obtaining Moore's testimony. Specifically, it complains that the Bureau improperly subpoenaed Moore, that it improperly threatened BTW with sanctions if it raised the attorney-client' privilege regarding Moore's testimony, and that it improperly withheld information concerning waivers of the privilege that it had obtained. Only the ALJ's interlocutory ruling permitting Moore's testimony is properly before us at this time. *See* 47 C.F.R. section 1.301(a)(c). Thus, BTW's claims of Bureau misconduct warrant no further consideration here.

[12] FCC 92I-037, released May 14, 1992.

[13] *See* note 1 *supra*.

[14] *O'Reilly v. New York Times Co.*, 692 F.2d at 868-869.

[15] Yelverton claims to represent the corporate entity BTW at least as that entity is defined by Wade, and Wade has not expressed dissatisfaction with Yelverton's efforts on behalf of BTW or of Wade in his "corporate capacity." That Yelverton's positions are the same as Wade's is evidenced by their pleadings concerning the attorney-client privilege. *See also*, Yelverton's statements and questions in hearing transcript at 1240-1383.

[16] Certain aspects of the *Private Brands* case were subsequently questioned, *see United States v. Plattner*, 330 F.2d 271 (2nd Cir. 1964), but the case continues to stand for the proposition that "hybrid" representation by retained counsel for the corporation and by an individual with identical interests is impermissable. *See O'Reilly v. New York Times*, 692 F.2d at 868 (distinguishing the facts in *Private Brands* from the facts in *O'Reilly*.)

[17] The right is set forth at 28 U.S.C. section 1654 ([i]n all courts of the United States, the parties may plead and conduct their own cases personally or by counsel....")

[18] *Order*, FCC 92M-575, released May 19, 1992.

9. IT IS FURTHER ORDERED, That the June 11, 1992 Motion to Strike Booker T. Wade's Notice of Appearance, filed by the Mass Media Bureau, IS GRANTED and Booker T. Wade's May 15, 1992 Notice of Appearance IS DISMISSED.

10. IT IS FURTHER ORDERED, That the May 22, 1992 Application for Review and the Motion for Stay, filed by Booker T. Wade, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-8

In re Applications of

EVE ACKERMAN	File No. BPH-871123MA
Wayne G. Fields and Geraldine Y. Miller d/b/a L.L. BROADCASTING	File No. BPH-871124ME
Brent L. Harmon and Elvin L. Harmon d/b/a/ HARMON BROADCAST PARTNERS	File No. BPH-871124MQ

For Construction Permit for
New FM Station on Channel 223A
Alachua, Florida

ORDER

Adopted: October 22, 1992; Released: October 30, 1992

By the Commission:

1. Before the Commission is an Application for Review filed May 20, 1992 by Eve Ackerman (Ackerman) and an Opposition filed June 4, 1992 by Wayne G. Fields and Geraldine Y. Miller, d/b/a/ L.L. Broadcasting (LL).[1] These pleadings relate to a Review Board decision, *Eve Ackerman*, 7 FCC Rcd 2493 (Rev. Bd. 1992), granting LL's application. Having thoroughly reviewed the record in this proceeding and the Board's decision, we find that the matters raised by Ackerman were properly resolved by the Board. Thus, we agree with the Board's disposition of this case and affirm its decision.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §1.115(g) the Application for Review filed May 20, 1992 by Eve Ackerman IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Harmon Broadcast Partners did not file an application for review of the Board's decision and thus the denial of its application is final.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Sagittarius
Broadcasting Corporation,
Infinity Broadcasting Corporation
of Pennsylvania &
Infinity Broadcasting Corporation
of Washington, D.C.

Licensees of Radio Stations
WXRK(FM), New York, New York
WYSP(FM), Philadelphia, Pennsylvania, &
WJFK(FM), Manassas, Virginia

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 1992; Released: October 23, 1992

By the Chief, Mass Media Bureau:

1. The Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration: (1) a Notice of Apparent Liability (NAL), 5 FCC Rcd 7291 (MMB 1990), issued to the Sagittarius Broadcasting Corporation, licensee of radio station WXRK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of radio station WYSP(FM) Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of radio station WJFK(FM), Manassas, Virginia, (collectively "Infinity"), in the amount of six thousand dollars ($6,000), two thousand dollars ($2,000) for each station; and (2) Infinity's February 11 and June 11, 1991, responses to the NAL.

2. The NAL was assessed for an apparent willful or repeated violation of 18 U.S.C. § 1464, prohibiting the broadcast of indecent material.[1] Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act of 1934, as amended, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs."[2] *See Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991)("*ACT II*"). In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)("*Pacifica*"), the Supreme Court upheld the Commission's authority to regulate indecent broadcasts and the U.S. Court of Appeals for the D.C. Circuit has upheld the Commission's authority to restrict the broadcast of indecent material when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988)("*ACT I* ").

3. A complainant alleged that on December 16, 1988, radio station WXRK aired indecent material on the Howard Stern Show, which airs from 6 to 10 a.m. on weekdays. Upon review of the complainant's tape recording of the broadcast, the Bureau sent the licensee a letter of inquiry ("LOI"). Based upon the broadcast and the licensee's response, the Bureau concluded that the material aired by WXRK, and simultaneously carried on WYSP and WJFK, apparently violated 18 U.S.C. § 1464, and issued a Notice of Apparent Liability for $6000 ($2000 to each of the three commonly-owned stations).

4. Infinity reiterates and augments many of the arguments from its response to our LOI: The Stern broadcast was not descriptive of sexual or excretory organs or activities; it was no worse than other cases the Bureau has dismissed; there is no reasonable risk of children in the WXRK audience from 6 to 10 a.m.; the determination of what is "patently offensive" for the radio should be a purely local standard; and WYSP and WJFK should not be fined as they were not the targets of any complaint. For the reasons outlined below, we find Infinity's arguments unpersuasive, and affirm the NAL's findings.

The Stern Broadcast Was Sufficiently Descriptive of Sexual Activities to Warrant an Indecency Finding.

5. Infinity reiterates its argument that the Stern material, consisting of "isolated words and phrases that were in and of themselves innocuous" was not "descriptive" of sexual or excretory activities or organs under the Commission's indecency definition. The Bureau responded that "detailed descriptions" were not a prerequisite to an indecency finding, citing *Letter to Carl J. Wagner (WFBQ(FM) and WNDE(AM))*, 6 FCC Rcd 3692 (MMB 1990). Infinity takes the Bureau to task for changing the indecency definition in a 1990 decision to eliminate the requirement of "descriptive" language or material altogether and applying it retroactively to Infinity.

6. The Commission has not eliminated the "description" requirement from the indecency definition. Infinity misinterprets the Bureau's statement by placing the emphasis on the word "description" rather than "detailed." Because the linchpin of indecency enforcement is the protection of children from inappropriate broadcast material, (*ACT I, supra*, at 1340), the extent to which a description is "detailed" enough is gauged by whether it is readily understandable to children in the audience. Thus, the amount of detail in a particular sexual or excretory description that is found indecent will vary according to context. The *Wagner*

[1] "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464.

[2] Though Infinity correctly points out that, since the *Infinity Reconsideration* decision, the definition has evolved through case law to include the words "material," "depicts" and "in context," the altered definition merely emphasizes the importance of context, and clarifies its application to the visual medium of television. The meaning remains the same. In fact, it was this definition that the *ACT II* court upheld.

decision is illustrative only of an indecency finding in which the discussion, though descriptive, was not "detailed" in nature, and yet could be understood by children. By the same token, although the sexual and excretory discussions in the Stern broadcast did not contain "detailed descriptions," they were sufficiently descriptive to be understandable to children.

Whether Material is Patently Offensive is a Matter for the Commission to Decide on a Case-by-Case Basis with Reference to Contemporary Community Standards for the Broadcast Medium

7. In its response to the LOI, Infinity cited several other broadcast indecency cases that the Commission dismissed as not actionable. Using a comparison of words and phrases, Infinity argued that the Stern excerpts were no worse, and in some instances more innocuous than, other broadcasts the Commission has determined were not patently offensive. Infinity expressed its belief that the Commission was not treating similarly-situated parties in a similar manner, in violation of *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). While rejecting that argument as unavailing on the basis of differing contexts in different cases, the Bureau did distinguish a representative example, the dismissal of an indecency complaint against television station KTVI, St. Louis, Missouri, for a broadcast of "Geraldo" entitled "Unlocking the Great Mysteries of Sex." We stated that while the program discussed sexual techniques in frank terms, it was not intended to pander or titillate and was not otherwise vulgar or lewd. NAL, 5 FCC Rcd at 7292 n.3. Infinity now resurrects its *Melody Music* argument, that the Bureau's treatment was "cursory" and "incorrect," and that the Bureau is "legally required" by *WAIT Radio v. FCC*, 418 F.2d 1153, 1156 (D.C. Cir. 1969) and other cases, to make a factual comparison of the particulars of those broadcasts the Commission determined were not indecent. Infinity also argues that by distinguishing the Geraldo broadcast on the basis that it was a "serious discussion," the Bureau is making an unconstitutional distinction between humorous and serious material.

8. As a preliminary matter, the Commission is not required to make factual distinctions among all broadcasts in the indecency area. The *Melody Music* case requires the Commission, when treating similarly-situated parties differently, to align the relevance of those differences to the Communications Act. 345 F.2d at 733. In that case, and its progeny, parties had taken the same course of action in violation of the Act. *Id.* at 732. In the indecency area, whether material is patently offensive is a factual determination, based on careful consideration of context, such as whether the words in context are vulgar or shocking, the manner in which they are portrayed, whether they are isolated or fleeting, and the work's relative merit. *Infinity Broadcasting Corporation of Pennsylvania (Reconsideration)*, 3 FCC Rcd 930, 931-32 (1987).[3] Thus, indecency determinations are highly fact-specific and are necessarily made on a case-by-case basis.[4] As a result, two parties would not be similarly-situated for purposes of analysis under *Melody Music*, unless both the substance of the material they aired *and* the context in which it was broadcast were substantially similar. In fact, we noted in the NAL that licensees that broadcast the same material under similar conditions receive like dispositions. *NAL, supra*, at 7292 n.4. What Infinity attempts, however, is to retrieve words and phrases from the context of the entire Stern broadcast and compare them to the same words or similar phrases from entirely different broadcast contexts. The Commission has refused to find that discrete words and phrases, in and of themselves, are indecent *per se*, in the absence of a contextual framework. *Letter to William J. Byrnes, Esquire (WBAI(FM))*, 63 RR 2d 216 (MMB 1987), *rev. denied sub nom. Pacifica Foundation, Inc.*, FCC 87-215, released June 16, 1987. Consequently, we find unavailing Infinity's contention that it has been disparately treated because words or ideas conveyed in the four-hour Stern broadcast were the same as or similar to those found in brief songs, dialogues or one-hour programs broadcast by other stations that have not been sanctioned.

9. In any event, the cases cited by Infinity as demonstrating the disparate treatment it has received are distinguishable. Considering that the purpose of indecency enforcement is to "shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear," (*ACT I, supra*, at 1340), the salient question in examining a broadcast is whether the sexual or excretory import was inescapable and understandable not only to adults but especially to children. In particular, Infinity challenges the Bureau to reconcile the Stern decision with the Bureau's determination that a daytime radio broadcast of the song "Slip It In" was not indecent. *See Letter to Ms. Julie Magnell*, dated October 26, 1989 (MMB)(dismissing indecency complaint against WSPN(FM), Saratoga Springs, New York). In that case, a review of the audiotape reveals that the individual words, in the context of the music, are barely audible, and thus would not be easily understood by children (or for that matter adults, without the aid of a written transcript). Further, there is not a single graphic or explicit reference to sexual or excretory organs or activities. The sexual import of the song was barely intelligible, much less inescapable to adults, so children who may have randomly tuned into WSPN[5] during the airplay of "Slip It In" would not have been likely to continue listening. If they had, they would not have been likely to discern the song's sexual meaning. *See Infinity Reconsideration*, 3 FCC Rcd at 933. The Stern broadcast, on the other hand, made frequent, explicit, patently offensive references to sexual intercourse, orgasm, masturbation, and other sexual conduct, as well as to breasts, nudity, and male and female genitalia, so that children who may have tuned in at any given moment of the broadcast would have been able to understand the context.[6]

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[3] Even in the area of obscenity, the Supreme Court left the determination of what is "patently offensive" to the inferior federal courts. *See U.S. v. Various Articles of Obscene Merchandise*, 600 F.2d 394, 403 (2d Cir. 1979).

[4] To the extent that Infinity's argument resembles a vagueness challenge, we note that our original and revised indecency definitions have survived vagueness challenges. *ACT I*, 852 F.2d at 1334; *ACT II*, 932 F.2d at 1508.

[5] In the parlance of the radio industry, the practice of random tuning behavior, in which listeners use radio scanning devices to rapidly tune through the entire channel menu, is known as "grazing." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464 ("Report on 24-Hour Ban")*, 5 FCC Rcd 5297, 5307 (1990)(subsequent history omitted).

[6] Infinity attempts to demonstrate the Bureau's enforcement inconsistency by pointing to the dismissal of a complaint against

10. We reject Infinity's suggestion that the Bureau is elevating serious over humorous material by finding the Stern broadcast actionably indecent. In *Pacifica*, the Supreme Court acknowledged that the Commission targeted the Carlin monologue for its patent offensiveness, not for its political or humorous content. 438 U.S. at 746. Similarly, the humorous nature of the Stern broadcast is ancillary to its patent offensiveness. Indeed, the Commission has found that a broadcast of excerpts from a play seriously addressing the topic of AIDS was indecent, and that the public value of the subject matter would not save it from an indecency finding. *Infinity Reconsideration, supra*, at 932. What we do consider in examining context, however, is the relative merit of the work, of which seriousness may be one element. For example, in *Letter to Mr. Peter Branton*, 6 FCC Rcd 610 (1991), the Commission upheld the dismissal of an indecency complaint against a station airing excerpts from a National Public Radio broadcast that included the repetitious use of the word "fuck." The Commission found that the use of the word in context, a legitimate news report, did not lend itself to a "pandering" or "titillating" interpretation. In a similar complaint dismissal, the Commission found that the material in "Teen Sex, What About the Kids?" was clinical or instructional in nature and not presented in a pandering, titillating or vulgar manner. *King Broadcasting Co. (KING-TV)*, 5 FCC Rcd 2971 (1990). These cases reflect our even-handed approach to both humorous and serious material.

11. In any event, the case Infinity relies upon, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) does not support the proposition that all types of material are entitled to the same degree of First Amendment protection. In *Hustler*, the Supreme Court refused to accord less First Amendment protection for speech that, though not defamatory, intentionally inflicts emotional distress on a public figure. *Id.* at 56. While the Court discussed the contribution of satirical cartoons to the public debate, it also recognized that the government could limit speech that is "vulgar, offensive, and shocking," ratifying *Pacifica*. *Id.*

12. We reiterate from the NAL our view that, notwithstanding the precedential value of indecency cases decided subsequent to the Stern broadcast, Infinity was on notice that the material it aired might be indecent. The only precedent at that time was the 1987 *Infinity* case in which WYSP was cited for a similar Stern broadcast. *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). We might be inclined to accord Infinity's judgment more deference if there had been no relevant precedent at that time. *See Infinity Reconsideration, supra*, at 933 (and cases cited therein).

Infinity's Station-Specific Poll Did Not Address the Reasonable Risk of Children in the New York Radio Listening Audience During the Stern Show.

13. Infinity challenges the Bureau's rejection of its Gallup poll, commissioned to show that since no children in the New York metropolitan area listen to the Stern show, there is no reasonable risk of children in WXRK's audience. In arguing that its poll is dispositive of the "reasonable risk" question, Infinity takes exception to the Bureau's suggestion in the NAL that, under new enforcement standards enunciated subsequent to the Stern broadcast, a station would have to show that children are not in the audience on a market-wide, rather than a station-specific, basis. We based this suggestion on the Commission's 1990 report supporting a congressionally-mandated 24-hour prohibition against broadcast indecency, which allowed broadcasters to demonstrate that "only 'a few of the most enterprising and disobedient young people' are in the broadcast audience in the station's market at the time of the broadcast in question." *Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. § 1464*, 5 FCC Rcd 5297, 5309 (1990)(quoting *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S.Ct. 2829 (1989). Infinity's survey is specific to the WXRK audience, but does not address the New York (or for that matter, Philadelphia and Washington, D.C.) radio listening audience in general. We found that Infinity had failed to show that children who may tune into a particular station while "grazing" though different frequencies would not be listening to the Stern show. *NAL*, 5 FCC Rcd at 7292.

14. Subsequent to the issuance of the NAL, the U.S. Court of Appeals for the D.C. Circuit vacated the Commission's report, ruling that it was "return[ing] the Commission to the position it briefly occupied after *ACT I* and prior to the congressional adoption of the appropriations rider." *ACT II*, *supra* at 1510. Infinity argues that its station-specific Gallup poll is a definitive disposition of the "reasonable risk" question, because the *ACT II* court has directed the Commission to initiate a proceeding to determine the times at which indecent material may be aired, taking into account the concerns raised in *ACT I, inter alia*, "the paucity of station- or program-specific audience data expressed as a percentage of the relevant age group population." *ACT II*, *supra* at 1510; *ACT I*, *supra*, at 1341. The *ACT I* court's discussion as to the Commission's lack of evidentiary support for its original midnight-to-6 a.m. channeling rule specifically did not address the Commission's daytime enforcement. Infinity's argument, that both *ACT I* and *ACT II* compel the Commission to reexamine those factors even with respect to daytime broadcasts, appears to rely on the one line of dicta in *ACT I* in which the court suggests that the Commission "would be acting with utmost fidelity to the first amendment were it to reexamine, and invite comment on, its daytime, as well as evening, channeling prescriptions." *Id.* While Infinity is correct in stating that the courts have not yet been asked squarely to address the issue, neither the *ACT I* nor the *ACT II* decisions stayed the Commission's daytime indecency enforcement, or required specific proof of a "reasonable risk" of unsupervised children in the audience during daytime hours pending the outcome of a proceeding to determine a new channeling rule.

15. With respect to Infinity's argument regarding the sufficiency of its poll, we believe that the only acceptable evidence sufficient to rebut the presumption that there is a reasonable risk of unsupervised children in the general radio listening audience is a market-wide showing that

a 1989 Stern broadcast which, Infinity argues, involved the "same context." For the reasons stated above, however, different episodes of the same program do not necessarily possess substantially similar "contexts" for purposes of an indecency determination.

"only 'a few of the most enterprising and disobedient young people' are in the broadcast audience in the station's market at the time of the broadcast in question." *24-Hour Ban*, 5 FCC Rcd at 5309. *See Evergreen Media Corporation of Chicago AM*, 6 FCC Rcd 502, 503 (MMB 1991)(no specific probative evidence submitted to rebut daytime presumption). The *ACT II* court did not invalidate the theory that if children in a given market are in the broadcast audience, they may well tune into a particular station when "grazing" through different channels on their radios. In fact, the *Pacifica* case recognized broadcasting's unique accessibility to children as a justification for the Commission's regulation of the indecent broadcast in that case. *Pacifica*, 438 U.S. at 749. More recently, the *Sable* case recognized broadcasting's unique technological inability to shield the unwilling listener, especially a child, from receiving an indecent message. *Sable, supra*, at 2837. Thus, Infinity's assertion that no unsupervised children listen to the Howard Stern show does not eliminate or reduce the reasonable risk that there are a significant number of children in the New York, Philadelphia, and Washington, D.C. audiences who "graze" the dial with regularity and may be "taken by surprise by an indecent message." *Id.*

The Bureau Properly Applied a Nongeographical Standard for Measuring Whether The Stern Broadcast Was Patently Offensive.

16. Infinity reiterates its argument that the proper standards for measuring "patent offensiveness" are varying local ones, rather than contemporary community standards for the broadcast medium. Again, Infinity cites several obscenity cases, such as *Miller v. California*, 413 U.S. 15 (1973), and *Hamling v. U.S.*, 418 U.S. 87 (1974), to support its proposition, and points to localism as the cornerstone of radio regulation under Section 307(b) of the Communications Act. According to Infinity, the phrase "contemporary *community* standards for the broadcast medium" (Infinity's emphasis) does not contemplate a national standard. Infinity also takes issue with the Bureau's assertion that both *Pacifica* and *ACT I* have upheld the nonlocal aspect of the Commission's indecency definition.

17. Infinity's assertion that the *Miller* and *Hamling* obscenity standards govern the Commission's statutory indecency standard is simply wrong, and reflects a misreading of those cases. The courts have consistently recognized a legal distinction between obscene speech, which has no First Amendment protection and may be totally prohibited, and indecent speech, which has First Amendment protection and may only be "channeled." *Pacifica, supra; Sable, supra; ACT I, supra. But see Barnes v. Glen Theatre, Inc.*, 59 U.S.L.W. 4745 (1991)(upholding prohibition of nude dancing despite its speech element).[7] In any event, the Supreme Court found in *Miller* that the First Amendment did not *compel* states to adopt a national obscenity standard. *Miller*, 413 U.S. at 30-31. As acknowledged in a later case, the Court expressed no view on whether state legislatures *could* adopt a national standard, or whether federal legislation could refer to a national standard. *Smith v. U.S.*, 431 U.S. 291, 304 n.11 (1977). Not only is *Miller* inapplicable to indecency, particularly broadcast indecency, it does not support the proposition Infinity advances, *i.e.*, that the First Amendment requires the employment of a purely local standard.

18. Further, the Supreme Court in *Pacifica*, and two panels of the D.C. Circuit in the *ACT I* and *ACT II* cases, specifically upheld the Commission's generic indecency standard, which includes the phrase "contemporary community standards for the broadcast medium." Neither court questioned the validity of a standard that does not address a particular geographic area, but relies instead on the expertise of Commissioners drawing on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters. *See Infinity Reconsideration, supra*, at 933. The *ACT I* court, in reviewing the Commission's decision in the *Infinity Reconsideration*, did not take issue with that aspect of the definition that recognized the appropriate standard as "based on a broader standard for broadcasting generally." *Id.* Infinity's arguments fail to persuade us to proceed otherwise.

The Commission's Enforcement Jurisdiction Extends to Any Broadcast Station That Airs Indecent Programming.

19. Infinity challenges the Bureau's assessments against WYSP and WJFK, which both simulcast "The Howard Stern Show," on the basis that the original complaint that triggered the Bureau's investigation targeted only WXRK. Infinity argues that the Bureau's action represents a major departure in policy, which Infinity believes has been grounded in limiting indecency enforcement to only those stations about which we have received "properly documented" complaints. Infinity points out that the Stern show was simulcast on WYSP and WXRK in 1987 when the Commission decided to pursue only WYSP, on the basis of a WYSP listener complaint. Infinity suggests that this approach will lead to an "unwieldy enforcement scheme" because, it surmises, an indecency finding on one affiliate's network or syndicated program would constitute an indecency finding for all other affiliates airing the same program.

20. The Commission enjoys broad enforcement discretion in the indecency area under 18 U.S.C. § 1464, 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), and 5 U.S.C. § 701(a)(2). *See also Heckler v. Chaney*, 470 U.S. 821 (1985)(agency discretion to refuse enforcement action is presumptively unreviewable under Administrative Procedure Act). Although the Commission acts primarily on a complaint-based system, (*see* "Commission Announces Action on 95 Indecency Complaints," Public Notice, Mimeo No. 448, released October 26, 1989), the Commission's statutory enforcement authority also extends to inquiries by the Commission on its own motion. *See, e.g.*, 47 U.S.C. § 403. Certainly, when information comes to the attention of the Commission through means other than a complaint, the Commission may initiate an inquiry. *See, e.g., Outlet Communications, Inc. (WXIN(TV))*, 5 FCC Rcd 2835 (MMB 1990)(initiation of Section 315 investigation based on station manager's remarks in trade journal). In any event, in this case the licensee has confirmed that material initially brought to our attention by a complainant, not by an independent Commission inquiry, was simulcast on two

[7] For example, the indecency definition does not recognize the presence of serious literary, artistic, political, or scientific value as required by the *Miller* standard. *Miller*, 413 U.S. at 24. Rather, merit is only one variable in determining the patent offensiveness of a particular broadcast. *Infinity Reconsideration*, 3 FCC Rcd at 932.

other Infinity-owned stations. In such circumstances, addressing our action to all three stations involved is entirely appropriate. *See Letter to Carl J. Wagner (WFBQ(FM) and WNDE(AM))*, 6 FCC Rcd 3692 (MMB 1990). Thus, we need not address here Infinity's concern that this approach will have untoward consequences with respect to network and syndicated programming. For these reasons, the forfeitures against all three Infinity stations will be imposed.

21. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Sagittarius Broadcasting Corporation, licensee of Radio Station WXRK(FM), New York, New York, Infinity Broadcasting Corporation of Pennsylvania, licensee of Radio Station WYSP(FM), Philadelphia, Pennsylvania, and Infinity Broadcasting Corporation of Washington, D.C., licensee of Radio Station WJFK(FM), Manassas, Virginia, FORFEIT to the United States the sum of two thousand dollars ($2,000) each for their violations of Section 1464 of Title 18 of the United States Code. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion & Order, a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 30, 1992

FCC ANNOUNCES 1993 MAXIMUM REIMBURSEMENT FEE FOR AN AMATEUR OPERATOR LICENSE EXAMINATION

The FCC announced today that effective January 1, 1993, the maximum allowable reimbursement fee for an amateur operator license examination will be $5.60. This amount is based upon a 3.0% increase in the Department of Labor Consumer Price Index between September 1991 and September 1992.

Volunteer examiners (VEs) and volunteer-examiner coordinators (VECs) may charge examinees for out-of-pocket expenses incurred in preparing, processing, administering, or coordinating examinations for Technician, General, Advanced, and Amateur Extra Class operator licenses. The amount of any such reimbursement fee from any examinee for any one examination session, regardless of the number of elements administered, must not exceed the maximum allowable fee. Where the VEs and the VEC both desire reimbursement, they jointly decide upon a fair distribution of the fee.

No fee is allowed to be charged for the Novice Class operator license examination.

This announcement is made pursuant to Section 97.527 of the Commission's Rules, 47 C.F.R. § 97.527.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 86-3

In the Matter of

Amendment of Part 90 of the
Commission's Rules Governing
Eligibility for the Specialized
Mobile Radio Services in the
800 MHz Land Mobile Band

ORDER

Adopted: October 22, 1992; Released: October 30, 1992

By the Commission:

1. By *Order*, 7 FCC Rcd 4398 (1992), we terminated our proceeding in PR Docket No. 86-3, where we considered elimination or modification of our existing restrictions on the eligibility of wireline telephone common carriers to become base station licensees in the Specialized Mobile Radio (SMR) Service. Citing numerous changes in the SMR industry subsequent to adoption of the *Notice of Proposed Rule Making* in the proceeding,[1] we found that neither the *Notice* nor the comments filed in response to it remained relevant to a meaningful determination of the issues.[2]

2. Having terminated PR Docket No. 86-3, we also terminated several waivers of the wireline prohibition that we had previously granted conditioned on the outcome of this proceeding.[3] To minimize disruption of service, though, we provided a short transition period. All outstanding conditional waivers would be terminated within ninety days of the effective date of the *Order* unless, within sixty days after the effective date, waiver recipients submitted a showing justifying their waivers in view of the policy considerations undergirding the wireline restriction. Waiver recipients submitting showings would retain their SMR interests while their submissions were under consideration.[4]

3. Southwestern Bell Corporation seeks a stay of this waiver termination.[5] We evaluate its request under the four-element test traditionally adopted for this purpose: (1) the likelihood that petitioners will prevail on the merits of the appeal; (2) the likelihood of irreparable injury to the petitioners in the absence of a stay; (3) injury to other interested parties that might arise from grant of a stay; and (4) where the public interest lies.[6]

4. Southwestern Bell maintains that failure to stay the termination of its waiver will cost it the time and expense of rejustification, or, worse yet, of planning disposal or dissolution of its existing SMR properties. If a stay is not granted and properties are disposed of before the case is completed, furthermore, Southwestern Bell argues that it will be irreparably harmed by the loss of its licenses and that its end users will suffer from the loss of its service. Southwestern Bell predicts that it will prevail on the merits of its appeal. And, it argues, there is no possibility of harm to others should a stay be granted, since it has operated for almost five years under its waiver without complaint of discrimination or unfair competition.

5. While we do not share Southwestern Bell's confidence in the ultimate success of its appeal, we must assess its claim in a flexible fashion, balancing the equities through a consideration of the other aspects of our test.[7] Southwestern Bell asserts, and we agree, that a premature relinquishing of control over its SMR interests could cause irreparable harm to the company and considerable inconvenience and expense to its systems' end users. Our *Order* does not mandate loss of control, however, but simply terminates existing waivers with an express invitation to rejustify them. Thus, as a practical matter, submitting a new waiver showing is the only "injury" that Southwestern Bell, or any other waiver recipient, will face absent grant of a stay.[8]

6. We do not, on balance, find this task of preparing and submitting a waiver justification so injurious as to tip the scales of hardship toward Southwestern Bell. Until and unless Southwestern Bell is forced to relinquish control of its SMR interests, an event that is neither imminent nor inevitable under our *Order*, other interested parties are not affected by our decision. Southwestern Bell may, upon submission of a waiver justification, continue operating its systems as it has in the past. The *status quo*, in short, is not significantly changed by the operation of our *Order*.

7. In view of the above, we conclude that equitable relief staying the termination of conditional waivers in our *Order* in PR Docket No. 86-3 is not justified. Accordingly, IT IS ORDERED, that the petition for stay filed by Southwestern Bell Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Notice of Proposed Rule Making, PR Docket No. 86-3, 51 Fed. Reg. 2910 (January 22, 1986).

[2] Bell Atlantic Enterprises International, Inc. and Southwestern Bell Corporation have filed petitions for reconsideration of the Order. BellSouth Corporation has filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

[3] These included waivers granted to Pacific Telesis, Inc., Advanced Paging Services, Inc., US West Paging, Inc., Southwestern Bell, and Bell Atlantic Enterprises International, Inc.

[4] Order at 4399.

[5] American Mobile Telecommunications Association, Inc., has filed an opposition to the petition for stay.

[6] *See, e.g.*, Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

[7] Holiday Tours, Inc., *supra.*, at 843.

[8] Should a submission be denied, the waiver recipient would then be required to either relinquish control of its SMR interests or appeal the staff's denial through appropriate channels. Neither prospect is so immediate as to warrant equitable relief at this time, however.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request for
Declaratory Ruling of

NATIONAL ASSOCIATION
OF BROADCASTERS

Regarding Section 312(a)(7)
of the Communications Act

STAFF RULING AND
REQUEST FOR PUBLIC COMMENT

Adopted: October 23, 1992; Released: October 23, 1992

Comment Date: January 15, 1993
Reply Comment Date: March 1, 1993

By the Chief, Mass Media Bureau:

1. The Commission has before it a request filed on August 18, 1992, by the National Association of Broadcasters ("NAB") seeking a declaratory ruling that broadcast stations need not provide legally qualified candidates for federal office with program time in increments other than those which the station ordinarily sells to commercial advertisers or which it ordinarily programs. In the alternative, NAB asks for a ruling that stations need not sell such time during programming not produced by the station itself (e.g., programming produced by networks and syndicators). Also before the Commission is a letter from the Democratic National Committee ("DNC") dated September 17, 1992, urging the Commission to allow a reasonable amount of time for public comment on the issue raised by NAB.[1] On October 9, 1992, People for the American Way and Media Access Project ("PAW/MAP") filed an opposition to NAB's request for declaratory ruling, arguing that grant of this request would require reversal of the Commission's longstanding and consistent interpretation of Section 312(a)(7).[2]

2. We agree that the issue raised in the NAB request for declaratory ruling should be set forth for public comment. Therefore, we invite comment from interested parties on NAB's request and the associated filings from the DNC and PAW/MAP.[3]

3. Until this proceeding is concluded, broadcasters should follow the current guidelines for evaluating requests for access. The guidelines a licensee must follow in evaluating requests for access under Section 312(a)(7) are well-established:

> [A]ccess requests from "legally qualified" candidates for federal elective office...must be considered on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of Section 315(a). These considerations may not be invoked as pretexts for denying access; to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption --perhaps caused by insufficient notice to allow adjustments in the schedule -- or of an excessive number of equal time requests.[4]

These guidelines have been approved by the Supreme Court and consistently followed by the Commission in evaluating complaints under Section 312(a)(7).[5] The Commission has never established formal rules outlining in a quantifiable manner how much time would satisfy these requirements. Instead, it has relied on the reasonable, good faith judgment of licensees to provide reasonable amounts of time to federal candidates.[6] Commission review of rea-

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[1] The DNC also argues that: (1) the Commission should defer action on the NAB request until presented with an actual case raising this issue; and (2) issues regarding broadcasters' reasonable access obligations cannot be decided in the abstract in light of the requirement that such questions must be examined on a case-by-case basis.

[2] In a letter dated September 22, 1992, Gillett Communications of Atlanta, Inc. ("Gillett"), licensee of station WAGA-TV, Atlanta, Georgia, urges the Commission to grant NAB's request for declaratory ruling. WAGA-TV states that it is the station's policy not to sell advertising time in more than two-minute increments, except for program-length commercials running thirty minutes or one hour. Apparently, WAGA-TV intends to apply this policy to a request for time by Daniel Becker, the Republican candidate for United States Congress from the Ninth Congressional District of Georgia. According to WAGA-TV, Mr. Becker informed the station that he intends to purchase five-minute increments of advertising time the weekend preceding the November 3, 1992, general election. In a second letter dated September 29, 1992, the DNC asserts that the "case" presented by WAGA-TV is missing information -- in particular, the candidate's purpose in asking for time, how many other requests for time this candidate has made, and how many similar requests could be expected from other candidates -- essential for resolution of a reasonable access question, and reiterates its position that action on the NAB request should be deferred. The Commission has not received a complaint from Mr. Becker, or any other candidate, regarding WAGA-TV's policy. For this reason, we decline to rule on whether WAGA-TV is required to sell five-minute increments to Mr. Becker.

[3] Interested parties can view copies of these documents at the Commission's Political Programming Branch, Room 8202, 2025 M Street, N.W., Washington, D.C. 20554, (202) 632-7586.

[4] *Carter Mondale*, 453 U.S. at 387.

[5] *See Carter-Mondale*, 453 U.S. at 387; *Ed Clark for President Committee*, 87 FCC 2d 417 (B/C Bur. 1980) ("*Ed Clark*"); *Ed Noble for U.S. Senate Committee*, 79 FCC 2d 903 (B/C Bur. 1980) ("*Ed Noble*"); *Kennedy for President Committee*, 80 FCC 2d 93 (B/C Bur. 1980). *See also, Arthur R. Block, Esq.*, 7 FCC Rcd 1784 (B/C Bur. 1992); *Mitchell Rogovin, Esq.*, DA 92-198 (released February 18, 1992); *Michael Steven Levinson*, 7 FCC Rcd 1457 (B/C Bur. 1992), application for review pending.

[6] *Report and Order* in *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 681 (1991). We en-

sonable access determinations by broadcasters currently follows a two-step process: (1) did the broadcaster follow the proper standards; and (2) was the broadcaster's explanation of its decision reasonable in terms of these standards.[7]

4. With respect to the issue raised by NAB, we note that the above guidelines do not mean that broadcasters will be required to provide five minutes or other non-standard lengths of program time to candidates in any particular instance. Rather, non-standard program time would only have to be provided if, based on the reasonable, good faith judgment of the broadcaster in weighing all the relevant factors, the provision of non-standard length program time is warranted. Indeed, in several previous decisions involving candidate requests for non-standard length program time, the Commission has determined that the broadcaster acted reasonably in denying the request.[8] Thus, the Commission will, as previously, defer to a licensee's discretion, and overturn a decision only if the licensee has acted unreasonably pursuant to the established guidelines.

5. Interested parties may file comments on or before January 15, 1993, and reply comments on or before March 1, 1993.[9] An original and five copies of all comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Political Programming Branch of the Federal Communications Commission, Room 8202, 2025 M Street, N.W., Washington, D.C. 20554.

6. For additional information on this proceeding, contact Maureen O'Connell, Political Programming Branch, (202) 632-7586.

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Roy J. Stewart
Chief, Mass Media Bureau

courage negotiation between candidates and broadcasters regarding how much advertising time, and the placement, a station will provide.

[7] *Carter-Mondale*, 453 U.S. at 375-76.

[8] *See, e.g., Ed Clark*, 87 FCC 2d at 428; *Ed Noble*, 79 FCC 2d at 910-11; *Hon. Donald W. Riegle*, 59 FCC 2d 1314, 1315 (1976); *Don C. Smith*, 49 FCC 2d 678, 680 (B.C. Bur. 1974); *Hon. Pete Flaherty*, 48 FCC 2d 838, 848 (1974); *Humphrey for President Campaign*, 34 FCC 2d 471, 472 (1972).

[9] We note that this is a non-restricted proceeding pursuant to Section 1.1206(b)(4) of the Commission's rules. 47 C.F.R. Section 1.1206(b)(4).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 21, 1992

Released: October 21, 1992

Arthur R. Block, Esq. 1800C3-M
250 West 57th Street 92-090414
Suite 317
New York, NY 10019

Dear Mr. Block:

This letter is in response to your September 11, 1992, complaint filed on behalf of Lenora B. Fulani and Lenora B. Fulani for President (hereinafter "Fulani"), alleging that American Broadcasting Companies, Inc. (hereinafter "ABC"),[1] violated Section 315(a) of the Communications Act, 47 U.S.C. Section 315(a).

You assert that Lenora Fulani is entitled to equal opportunities based on the appearance of H. Ross Perot on an ABC network program entitled "Who is Ross Perot?," which aired on June 29, 1992, for one hour and forty minutes, beginning at 11:30 pm. This program followed an earlier program of the same name which aired from 10:00 to 11:00 pm. You claim that, at the time of the broadcast, Perot was a legally qualified candidate for the office of President of the United States on a national basis, and that Fulani was a legally qualified candidate for President in eight states.[2] You assert that on July 6, 1992, you requested equal opportunities from ABC and the ABC affiliates broadcasting the Perot program in those eight states.[3]

You claim that Fulani is entitled to equal opportunities because the program does not qualify for any of the news exemptions contained in Section 315(a) of the statute.[4] Specifically, you argue that the program is not exempt as a news interview program under Section 315(a)(2) because:

> o The program was not part of, and preempted, the regularly scheduled news interview program "Nightline." The program ran under a different name, with a different format, a different moderator, and ran longer than the half-hour scheduled for the "Nightline" program.
>
> o The selection of the format, content, and participants was not under the exclusive control of the licensee, but rather under the control of Perot, as evidenced by the following: 1) the host of the program, Peter Jennings, did not know in advance the questions that were asked; 2) Perot, as a condition of his appearance, demanded the opportunity to respond to the ABC program about his life which aired at 10:00 pm on the night of the instant program; and 3) one question was asked by an audience member that was not scheduled by ABC, proving that ABC did not have control over the program. You also assert that the town meeting format was not chosen by ABC but was negotiated with Perot, and was an extension of his "electronic town meeting" idea used in his campaign.
>
> o ABC's decision as to format, content, and participants was not done in the exercise of bona fide news judgment but for ABC's commercial advantage in its ratings war with the other networks.

In addition, you argue that the program did not qualify for exemption as on-the-spot coverage of a bona fide news event under Section 315(a)(4) because the appearance by Perot was sponsored by the broadcaster, and the only broadcast-sponsored event that can qualify for the exemption is a debate or debate-like event.[5]

ABC voluntarily responded to the complaint on September 24, 1992.[6] It asserts that the "Who is Ross Perot?" was a bona fide news interview, exempt from the equal opportunity requirements of Section 315(a). First, ABC argues that the program was part of a regularly scheduled news interview program which typically carries the "Nightline" title. ABC states that, from time to time, "Nightline" carries a different title and an expanded news interview format. These programs are typically called "Town Meeting," "National Town Meeting," or "ABC News Forum." The format of these programs permit questions from the interviewer, as in "Nightline," but also pre-selected questions from an audience, pre-selected by ABC news personnel. ABC includes, as Exhibit B to its response, a list of thirteen occasions since 1988 in which the expanded format was used. In addition, ABC includes, as Exhibit C, a list of

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[1] The complaint is also filed against the following ABC affiliate stations: KHOG-TV, Fayetteville, AR; KHBS-TV, Ft. Smith, AR; KAIT-TV, Jonesboro, AR; KATV-TV, Little Rock, AR; WMTW-TV, Auburn, ME; WVII-TV, Bangor, ME; WLOX-TV, Biloxi, MS; WABG-TV, Greenville , MS; WAPT-TV, Jackson, MS; WTOK-TV, Meridian, MS; WLOV-TV, West Point, MS; WTVC-TV, Chatanooga, TN; WBBJ-TV, Jackson, TN; WKPT-TV, Kingsport, TN; WATE-TV, Knoxville, TN; WHBQ-TV, Memphis, TN; WKRN-TV, Nashville, TN; KTVX-TV, Salt Lake City, UT; WVNY-TV, Burlington, VT; KOMO-TV, Seattle, WA; KXLY-TV, Spokane, WA.

[2] Arizona, Arkansas, Minnesota, Mississippi, South Carolina, Tennessee, Utah, and Vermont.

[3] Because the Bureau finds, *infra*, that the program in question is exempt from equal opportunities under Section 315(a) of the Act, we do not reach the issue of whether either Perot or Fulani were legally qualified candidates at the time of the broadcast.

[4] You also claim that Fulani entitled to one hour and forty minutes of free broadcast time under the reasonable access provision of 47 U.S.C. Section 312(a)(7). Section 312(a)(7) does not require stations to provide reasonable access free of charge. As a result, this allegation is dismissed.

[5] Because we find, *infra*, that the program is exempt under the bona fide news interview exemption, we do not render any decision as to whether the program is exempt as on-the-spot coverage of a bona fide news event.

[6] In addition to the response filed by ABC, we have received ten additional responses from the following affiliate stations: WHBQ-TV; WATE-TV; WBBJ-TV; WABG-TV; WKRN-TV; WLOX-TV; KOMO-TV; WKPT-TV; WTOK-TV; and WVNY-TV. In general, these pleadings adopt the arguments as presented in the ABC response.

twenty-two occasions since 1991 in which the 11:30 pm news interview program (either as "Nightline" or another title) ran longer than the scheduled half-hour period.

Second, ABC asserts that it, not Perot, maintained control over the content and format of the program. It states that, prior to the broadcast, ABC news production personnel selected the questioners and the questions they would be permitted to ask. Questioners were instructed to avoid speechmaking. The executive producer decided which questions to include in the broadcast and in which order. ABC asserts that Peter Jennings intervened as he saw fit to prevent speeches by questioners, to clarify questions, or to bring a questioner back to the point. In addition, ABC argues that it decided to offer Perot an opportunity to respond to the 10:00 pm program featuring his life based upon its bona fide news judgment that this response would be informative and journalistically fair, in light of the critical nature of some of the earlier program's contents, and not because Perot requested it.

DISCUSSION

Section 315(a) of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcast station it must afford equal opportunities to other such candidates for that office. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from equal opportunities, appearances by legally qualified candidates on the following news programs:

> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program qualifies as a "bona fide news interview," the Commission considers the following factors: (1) whether it is regularly scheduled; (2) whether the program is under the control of the network or licensee;[7] and (3) whether the interviewer's decisions as to the format, content, and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance an individual's candidacy. *See U.S. News and World Report, L.P.*, 2 FCC Rcd 7101 (1987).

Based on the foregoing, it appears that "Who is Ross Perot?" is exempt from equal opportunities as a bona fide news interview under Section 315(a)(2). First, the program was a regularly scheduled news interview program. ABC asserts, and Fulani acknowledges in her pleading, that "Nightline" is a bona fide news interview program exempt from Section 315(a) of the Act. You did not file a response to ABC's pleading disputing ABC's claim that it has regularly incorporated the "town meeting" or "forum" program format into its "Nightline" series since 1988. *See* ABC Exhibit B. Although the program did not carry the standard "Nightline" title, this alone would not remove the exemption. In *Storer Broadcasting, Co.*, a program that had been broadcast quarterly for seven years, although not always under the same name, was held to be exempt from Section 315 as a bona fide news interview. *Storer Broadcasting, Co.*, 58 FCC 2d 982 (B. Bur. 1976). Further, the fact that the program ran longer than the allotted time period for "Nightline" also would not remove the exemption. *See, Political Primer 1984*, 100 FCC 2d 1476, 1499 (1984). Thus, we conclude that "Nightline," including the title and format used for the Perot program, is a regularly scheduled news interview program.

Second, it appears that ABC, and not the candidate, controlled the production of the program. ABC asserts that the format was chosen by them, and was unrelated to the "electronic town meeting" idea used by Perot in his campaign. This assertion by ABC is supported by the fact that the format of the program was used by ABC prior to Perot's candidacy and for a host of different issues. *See* ABC's Exhibit C. In addition, the questions were prescreened and the audience members were chosen by ABC, and ABC controlled the order of the questions. The fact that Peter Jennings did not know the questions in advance did not take control away from ABC or put it in the hands of the candidate. There is nothing in the transcript of the program to indicate that Jennings did not control the interview throughout. Although one questioner asked an unscheduled question, it does not appear that Jennings lost control of the program as a result. In addition, although ABC did permit Perot the opportunity to respond to the 10:00 pm program, there is no evidence that Jennings did not control that portion of the interview as well.[8]

Third, according to ABC, decisions as to the program's content and format, including the opportunity Perot was afforded to respond to the preceding program, stemmed from ABC's good faith journalistic judgment and newsworthiness, and was not designed or intended to favor Perot's candidacy. Fulani has not presented any evidence to the contrary.

CONCLUSION

In view of the foregoing considerations, we believe that "Who is Ross Perot?" is exempt from equal opportunities under Section 315(a)(2) of the Communications Act as a bona fide news interview.

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[7] This requirement was recently modified to require only that the program's producers control the program's production details. *See Request for Declaratory Ruling That Independently Produced bona fide News Interview Programs Qualify for the Equal Opportunities Exemption Provided in Section 315(a)(2) of Communications Act*, 7 FCC Rcd 4681 (1992).

[8] Fulani's cites, as support for its allegation that ABC did not control the first portion of the interview, the incident where Jennings interrupted Perot, Perot asked to finish his response, and Jennings apologized. This alone does not prove that Perot controlled that portion of the program. In fact, ABC responds to the allegation by stating that its interviewer was merely attempting to be polite.

Staff action is taken here pursuant to delegated authority. Application for Review by the full Commission may be filed within thirty days of public notice of this letter (*see* Commission Rule 1.4(b)[47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. *See* Commission Rule Section 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition of

Jose M. Oti,
d/b/a Sandino Telecasters

For Termination of Authorization of
Angeles Broadcasting Network,
Interim Licensee of Station KAGL(TV),
San Bernardino, California

ORDER

Adopted: August 25, 1992; Released: August 25, 1992

By the Commission:

1. On August 21, 1992, Angeles Broadcasting Network (Angeles), the interim licensee of station KAGL(TV), channel 30, San Bernardino, California, filed an application for review of the August 20, 1992 action of the Chief, Video Services Division, denying motions to stay the June 26, 1992 directive to Angeles to terminate the interim operation of KAGL(TV) on or before August 25, 1992.[1] San Bernardino Mountains and Environment Preservation Society Inc. (Preservation Society) filed a petition for special relief on August 24, 1992, seeking a "stay" of the staff's August 20th action.[2] Jose M. Oti, d/b/a Sandino Telecasters (Sandino), permittee of unbuilt station KZKI(TV), channel 30, San Bernardino, opposes Angeles' application for review. We will now consider these pleadings.

2. In denying the aforenoted motions for stay, the staff concluded that continuation of KAGL(TV)'s interim operation would preclude the construction and activation of a permanent channel 30 facility by Sandino and that Angeles, whose temporary operations are secondary to those of the authorized permanent operator, had not demonstrated that it would suffer irreparable injury if a stay was not issued. Similarly, Preservation Society was found to have failed to show that the injury complained of was of such imminence that there was a need for injunctive relief to prevent irreparable harm. Finally, the staff concluded, based upon the arguments and facts before it, that there was no showing of substantial likelihood of success on the merits and that the public interest would be harmed by further delay in the activation of a permanent channel 30 facility by Sandino.

3. We have fully reviewed the staff's denial of the motions for stay and find that the matter was fairly considered and properly decided upon applicable precedent. In affirming the action of the staff, we also address Preservation Society's assertion of bias on the part of the Chief, Video Services Division, which is raised for the first time in the instant petition for special relief. Preservation Society submits that the Chief of the Video Services Division is a named defendant in a pending consolidated federal district court action involving Dr. W. Eugene Scott, the former operator of channel 30, and that the August 20th action was "motivated by prejudice and a desire to obtain revenge." These accusations are conclusory and are unsupported by any facts demonstrating an inability to act in a impartial manner.[3] Moreover, as pointed out by Preservation Society, "Dr. E. Eugene Scott . . . is not an officer, employee, nor director of any of the corporations involved in this matter." Under these circumstances, we reject Preservation Society's unfounded claim of bias.

4. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, the "Emergency Application For Review and Request for Stay," filed by Angeles Broadcasting Network and the "Petition for Special Relief," filed by San Bernardino Mountains and Environment Preservation Society ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Specifically, Angeles requested that it be allowed to continue to operate KAGL(TV) until sixty days after a ruling on its petition for reconsideration. In its application for review, it now requests a continuance until sixty days after a final agency ruling on the merits of its arguments. In view of our action herein, we find this latter request for stay to be moot.

[2] Notwithstanding the apparent failure to conform to the service requirements of Section 1.47 of the Commission Rules and the failure to submit any showing under the factors warranting the imposition of a stay (*see Washington Metropolitan Area Transit Commission v. Hiliday Tours, Inc.*, 559 F2d 841 (D.C. Cir 1977)), We have elected, in the exercise of our discretion, to treat Preservation Society's pleading as a petition for review of the staff's August 20th action.

[3] Also, named as party defendants in the aforenoted judicial proceeding are this agency and several of its present and former members.

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	RM-7981 RM-8004

FIRST REPORT AND ORDER AND THIRD NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1992; Released: October 16, 1992

Comment Date: January 13, 1993
Reply Comment Date: February 12, 1993

By the Commission: Commissioners Barrett and Duggan issuing separate statements.

I. INTRODUCTION

1. By this action, the Commission is providing for the redevelopment of 220 MHz of spectrum in the 1.85 to 2.20 GHz band for future communications services that employ emerging technologies. This action will make possible the operation of a broad range of new communications services that employ emerging technologies. The new services expected to operate on these frequencies will provide the American public with enhanced personal access to communications services and enable businesses to realize increases in productivity. The opportunity to develop these new services also will promote the ability of American industry to maintain its competitive leadership position in global telecommunications markets. We also are adopting a plan that will provide for fair and equitable sharing of the 2 GHz frequencies by new services and the existing fixed microwave services that currently use this spectrum and/or relocation of existing 2 GHz facilities to other spectrum. The transition plan for sharing and relocation that we are proposing herein is consistent with approaches suggested by both commenting parties and the Congress, and is intended to prevent disruption of existing 2 GHz services and minimize the economic impact on the licensees of those services.

II. BACKGROUND

2. Advancements in digital technology and signal processing have increased possibilities for the development of a broad range of new radio communications services. Since the advent of cellular service nearly a decade ago, advances in mobile and portable technologies have increased the potential service offerings that could use these technologies. Interested parties are developing new applications such as advanced digital cellular and personal communications services (PCS). Similarly, for the business community, communications providers are developing new applications such as mobile facsimile, wireless private branch exchange, and wireless local area networks. These technical advances have increased the need for additional spectrum to foster the growth and development of new services.[1] These "emerging technologies" also need spectrum to ensure the future competitiveness of the United States' communications industry in international markets.

3. Accordingly, in the *Notice of Proposed Rule Making* (*Notice)* in this proceeding, we proposed to redevelop spectrum for emerging technologies.[2] Specifically, we proposed to establish 220 MHz of spectrum in the bands 1.85-1.99, 2.11-2.15, and 2.16-2.20 GHz for emerging technologies. This spectrum currently is used by private and common carrier fixed microwave services. We also proposed options for transition and relocation of the current microwave licensees operating in this spectrum to the 4, 6, 11, 12, and 18 GHz fixed microwave bands.

4. This proposal was based on a study of the possibilities for creating emerging technologies bands by the Commission's Office of Engineering and Technology (Spectrum Study)[3] This study concluded that frequencies in the 1.85-1.99, 2.11-2.15, and 2.16-2.20 GHz bands were the best candidates for accommodating the demand for new services and technologies. The Spectrum Study also explored the feasibility of relocating the existing 2 GHz microwave operations to higher frequency bands, or to alternative media such as satellites and fiber optics. 5. In the *Notice,* we recognized the important and vital services currently being provided by the existing 2 GHz fixed microwave facilities. We therefore indicated our intention to reaccommodate those facilities in higher fixed microwave bands in a manner that would be most advantageous to those licensees, be least disruptive to the services they provide the public, and foster the introduction of emerging technologies services.[4] To accomplish this, we proposed a transition plan consisting of three elements: 1) conserving vacant 2 GHz spectrum by granting licenses for new fixed microwave facilities on a secondary basis only;[5] 2) allowing current 2 GHz fixed microwave licensees to continue operating on a co-primary basis with new services for some fixed period after which they would be reduced to secondary status (with the exception of state and local government licensees that would be co-primary), or for an indefinite period; and 3) encourag-

[1] As the development of new electronic devices and applications has increased, the number of requests for spectrum to accommodate new services made feasible by these developments has increased. For example, in the case of PCS, the Commission has granted over 150 experimental authorizations and received 96 requests for pioneer's preference.

[2] *Notice of Proposed Rule Making*, ET Docket No. 92-9, adopted January 16, 1992, 7 FCC Rcd 1542 (1992).

[3] *See* "Creating New Technology Bands for Emerging Telecommunications Technology," OET/TS 92-1, January 1992.

[4] *See Notice, supra*, at para. 22.

[5] We also stated that licenses for new 2 GHz facilities in the proposed emerging technologies bands would be granted on a secondary basis only, if the application was filed after the *Notice*. In May, the staff issued a "2 GHz Licensing Policy Statement," in which it clarified that this policy does not apply to applications for modification of facilities licensed prior to the date of the *Notice*. The staff concluded that, conditional on a valid showing of need for the facilities, secondary status should not be applied in certain situations where the licensee may require additional links. *See* "2 GHz Licensing Policy Statement," *Public Notice*, Mimeo No. 23115, May 14, 1992.

ing early access to 2 GHz spectrum by allowing providers of new services to negotiate financial arrangements for reaccommodation of 2 GHz fixed microwave licensees.[6] We requested comment on whether 2 GHz spectrum should be made available in phases,[7] and on whether and how the availability of government spectrum might affect our transition proposals.[8]

6. In response to the *Notice*, the Utilities Telecommunications Council (UTC) and Alcatel Network Systems, Inc. (Alcatel) filed petitions requesting that the Commission consider specific reallocation and rechannelization plans and technical rules to govern access to higher fixed microwave bands by 2 GHz licensees.[9] On August 5, 1992, the Commission adopted a *Further Notice of Proposed Rule Making* (*Further Notice)* proposing to restructure the higher frequency fixed microwave bands generally consistent with the UTC and Alcatel petitions.[10]

Related Matters

7. *The PCS Proceeding.* On July 16, 1992, the Commission adopted a *Notice of Proposed Rule Making* (*PCS Notice)* in GEN Docket No. 90-314 that, among other things, proposed that between 80 and 140 MHz of 2 GHz spectrum proposed for emerging technologies in this docket be allocated for PCS services. Our final action in the PCS proceeding is conditioned on the outcome of the instant proceeding.[11]

8. *WARC-92.* Internationally, efforts also are under way to authorize and develop new mobile technologies. In March 1992, the World Administrative Radio Conference (WARC-92) recognized that worldwide 2 GHz spectrum likely will be used for future public land mobile telecommunications systems (FPLMTS), which are similar to PCS in concept. The conference maintained the primary fixed and mobile allocations at 2 GHz in Region 2; added mobile-satellite service (MSS) allocations in the 1930-2010 and 2120-2200 MHz bands; and adopted a footnote stating that FPLMTS are expected to use the 1885-2025 MHz and 2110-2200 MHz on a worldwide basis.[12]

III. DISCUSSION

Allocation Issues

9. *Need for Spectrum Redevelopment.* Most of the commenting parties support the Commission's proposal to redevelop spectrum for emerging technologies. Many parties agree with our initial conclusion that there is a pressing need for spectrum to accommodate emerging technologies. They submit that this spectrum is essential for operation of new digital and mobile services that make use of technological advances. Many parties also state that spectrum must be made available now for emerging technologies if the United States is to remain competitive in the international telecommunications market. For example, American Personal Communications (APC) notes that U.S. competitors in Europe and the Far East already have allocated spectrum to enable implementation of new technologies. Ameritech agrees that it is important to designate spectrum for emerging technologies, so that U.S. enterprise is not left out of worldwide developments.

10. A number of incumbent users of the 2 GHz fixed microwave spectrum agree with our initiative to redevelop 2 GHz fixed microwave spectrum for emerging technologies, provided that relocation of existing users is taken adequately into account. For example, Baltimore Gas and Electric (BG&E), a 2 GHz fixed microwave licensee, states that in an age of proliferating information services it is vital to provide spectrum for emerging technologies. BG&E contends that the many recent requests for spectrum for new services the Commission received subsequent to proposing emerging technologies bands demonstrates that spectrum redevelopment is in the public interest.[13] The City of San Diego, which operates nine 2 GHz microwave paths as the backbone of its Public Safety Radio system, supports our reallocation proposal, provided market based negotiations are allowed as a means of voluntarily relocating existing users.[14] San Diego Gas and Electric Company, an investor-owned utility, also supports our proposal, provided that existing users be fairly compensated for any relocation.

11. Several parties believe that the 220 MHz the Commission proposes to reallocate for emerging technologies is insufficient. Motorola, Inc. states that its analysis indicates that over 300 MHz of spectrum will be needed to accommodate identified emerging technologies. Similarly, AMSC

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[6] *See Notice, supra*, at paras. 23-26.

[7] *Id.* at para. 27.

[8] We requested comment on the feasibility of using government spectrum in the 1.71-1.85 GHz band for relocation of existing 2 GHz operations, noting that the Spectrum Study did not examine the availability or suitability of government spectrum for relocation of existing 2 GHz operations. *See Notice, supra*, at paras. 21 and 27.

[9] *See* UTC Petition for Rule Making (RM-7981) (filed March 31, 1992), and Alcatel Petition for Rule Making (RM-8004) (filed May 22, 1992).

[10] *See Further Notice of Proposed Rule Making*, ET Docket No. 92-9, FCC 92-357.

[11] *See Notice of Proposed Rule Making*, GEN Docket No. 90-314, FCC 92-333 at para. 32.

[12] *See* International Telecommunication Union, *Final Acts of the World Administrative Radio Conference (WARC-92)* and *Addendum and Corrigendum to the Final Acts of the World Administrative Radio Conference*, Malaga-Torremolinos (1992). WARC-92 also allocated spectrum for MSS in the band 1610-1626.5 MHz (Earth-to-space) on a worldwide primary basis. An additional worldwide allocation in the band 1613.8-1626.5 MHz (space-to-Eart was made on a secondary basis for MSS as well as an additional primary allocation in the band 1675-1710 MHz for Region 2. A new primary MSS allocation in the band 1626.5-1631.5 MHz (Earth-to-space) also was made for Regions 2 and 3. In the 2 GHz portion of the spectrum, Region 2 received a primary allocation for MSS in the bands 1970-2010 (Earth-to-space) and 2160-2200 MHz (space-to-Eart and a secondary allocation in the bands 1930-1970 (Earth-to-space) and 2120-2160 MHz (space-to-Earth.

[13] *See* BG&E's comments at 1-2.

[14] The City of San Diego also submits that as an active member of the Associated Public Safety Communications Officers (APCO) it recently supported APCO's opposition to the Commission's proposal, but that it would accept reallocation to higher frequencies provided it is compensated adequately.

Subsidiary Corporation (AMSC) and Tel/Logic submit that the proposed 220 MHz of spectrum should be considered only the start of spectrum redevelopment. AMSC requests that the Commission reallocate a total of 130 MHz for new mobile-satellite services.[15]

12. A number of parties oppose the Commission's reallocation proposal and question the analysis contained in the Spectrum Study. UTC and American Petroleum Institute (API) question the initial determination to fully analyze only frequencies between 1-3 GHz as candidates for emerging technologies. Others, among them API, Association of American Railroads (AAR) and Consolidated Edison Company of New York, Inc., argue that the study did not consider adequately the feasibility of relocating the multipoint distribution service (MDS) and broadcast auxiliary service (BAS), which also operate in the 2 GHz range. The American Public Power Association, Centel Corporation, and McCaw Cellular Communications, Inc. contend that the Spectrum Study underestimates the cost of relocating 2 GHz fixed microwave users to higher bands. UTC, AAR, the American Gas Association, and the Public Safety Microwave Committee, among others, claim that the study has not thoroughly analyzed the cost and practicality of fixed microwave operations switching to alternative media such as fiber optic cable or satellites. Finally, UTC and several others question the study's findings with regard to the methodology used to determine fixed microwave use of the 2 GHz band, the path lengths of communications links in 2 GHz fixed microwave networks, and the practicality of moving those networks to higher bands.

13. Some parties representing existing 2 GHz fixed microwave interests also argue that the Commission did not make the proper public interest analysis in selecting the 2 GHz band for accommodation of emerging technologies. These parties state that the Commission's actions imply that it considers incumbent 2 GHz fixed microwave operations to be less in the public interest than potential emerging technologies that would operate in the same bands. Others, such as Alascom, Inc., Telephone Utilities of Eastern Oregon, Inc., and Telephone Utilities of Washington, Inc., oppose any action that would impair or disrupt the essential telephone services they provide. Many utilities also oppose reallocation of 2 GHz fixed microwave spectrum for similar reasons. Finally, some parties contend that any reallocation action would be premature until the Commission defines more precisely the exact services using emerging technologies that would operate in the 2 GHz band.[16]

14. We continue to believe that the public interest will be served best by making spectrum in the 2 GHz band available for emerging technologies. There is an immediate need for additional spectrum to sustain the growth of services made possible through new technologies. As indicated in the *Notice*, we now have pending requests for approximately 400 MHz of spectrum for new services that include PCS, data PCS, MSS, and low-Earth orbit satellites.[17] These services are expected to provide the public with enhanced personal access to communications services and to enable businesses to realize increases in productivity. We also observe that the uncertain current and future availability of spectrum is a major obstacle to the development of emerging technologies and implementation of services using these technologies.[18] Further, access to 2 GHz spectrum by emerging technology proponents will promote the ability of American industry to maintain their competitive leadership position in global telecommunications markets.

15. We also continue to believe that the 2 GHz bands proposed in the *Notice* are the appropriate locations for this redevelopment. As we indicated in the *Notice*, it is important that the emerging technology bands be able to meet the requirements of a significant number of new services and to support the operation of mobile, as well as fixed, operations. No information submitted in this proceeding demonstrates any material flaw in the analyses used in the Spectrum Study. We continue to believe that the study provides a sound basis for spectrum redevelopment and that the staff's initial decision to target spectrum between 1-3 GHz is appropriate.[19] Frequencies below 1 GHz are used principally for broadcast and mobile services that would be difficult to relocate or consist of narrow, scattered bands that aggregated would not provide sufficient spectrum for emerging technologies. Frequencies above 3 GHz were eliminated from consideration primarily because propagation characteristics in this range make such spectrum less practical for mobile operations -- 3 GHz is the upper operating limit for state-of-the-art equipment for mobile use. In addition, other countries are allocating spectrum in the 1-3 GHz range for the kinds of services and systems that we are contemplating.

16. We also remain convinced that exclusion of the 2 GHz BAS and MDS bands is correct. As the staff noted in the Spectrum Study, the BAS bands are used for both fixed and mobile operations in support of television programming.[20] The only candidate band for relocation of BAS operations -- 6.875-7.125 GHz -- already is allocated to BAS and likely would not be able to accommodate substantial numbers of 2 GHz operations. Also, according to the Society of Broadcast Engineers, Inc., many 2 GHz fixed broadcast auxiliary links have voluntarily relocated to higher bands, thus freeing spectrum for difficult to relocate mobile 2 GHz BAS operations (*e.g.*, electronic news gathering). Further, as noted by the National Association of Broad-

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[15] AMSC also contends that for MSS, sharing with other services is not likely to be feasible.

[16] In addition, pending are seven identical petitions to hold administrative hearings filed by the Metropolitan Water District of Southern California and Questar Service Corporation on June 24, 1992; Commonwealth Edison Company, Montana Power Company, and Public Service Electric and Gas Company on June 29, 1992; Seattle City Light on August 17, 1992; and Takoma Public Utilities (*sic*) on August 19, 1992. These utilities argue that the procedures provided for notice and comment rule making by the Administrative Procedure Act, 5 U.S.C. §§ 151 *et. seq.*, are insufficient "to engage the agency in a meaningful discussion of the complex issues involved," and therefore request that we hold "administrative hearings." Contrary to the assertion of these petitioners, we believe that the more than 160 written comments and reply comments filed in this proceeding fully discuss the issues raised by this proceeding, and that written responses are *more* helpful than oral presentations in this particular case because complex detailed technical issues are involved. We also note that this is an non-restricted proceeding, and therefore that interested parties are free to discuss these issues with Commissioners and staff as provided by our *ex parte* rules, 47 C.F.R. §§ 1.1200 *et seq.* Accordingly, we deny these seven petitions.

[17] *See Notice*, *supra*, at para. 4.

[18] *Id.* at para. 7.

[19] *See* Spectrum Study, *supra*, at 2.

[20] *Id.* at 10.

casters, the Association for Maximum Service Television, Inc., and others, the expected implementation of advanced television service will increase substantially the demand for BAS spectrum.

17. With regard to the spectrum currently used for MDS operations, we note that MDS is a developing service with over 24,000 applications pending.[21] The Wireless Cable Association International, Inc. (WCA) states that currently there are 100 MDS operations that serve 500,000 subscribers. WCA expects that many more systems will initiate service as the Commission acts on the backlog of applications. We agree with WCA, Texas Wired Music, Inc., and others that, given the substantial demand for MDS evidenced by the number of pending applications, it should be afforded sufficient time to develop.[22] Also, there are no frequency allocations above 3 GHz that could readily support the requirements of MDS, which are wide-area and point-to-multipoint in nature.[23]

18. With regard to commenters' concerns that the costs of relocation were underestimated, the Spectrum Study attempted to make fair estimates of necessary equipment costs and the economic impact upon microwave users of relocation from the 2 GHz bands. These estimates were intended to indicate a reasonable scale of such expenses, rather than the actual cost associated with specific conversions.[24] However, to the extent that our proposed regulatory scheme would require new users to pay costs of relocation as a condition of obtaining exclusive use of 2 GHz spectrum, discussed below, it is unnecessary to consider the degree of accuracy of the estimated costs.

19. UTC, AAR, and others argue that alternative media such as fiber optics and satellites are not suitable alternatives to 2 GHz fixed microwave systems. Their objections may be based upon a misinterpretation of the Spectrum Study's findings. The study did not recommend, as UTC states, "use of fiber optics as a wholesale replacement for 2 GHz microwave." Rather, the study merely suggests that fiber optics and satellites are possible replacement options for some existing 2 GHz fixed microwave communications.[25] In this regard, we note that fiber optic and satellite systems already are used by UTC and AAR members. For example, BG&E states that it uses fiber optics for some voice and data requirements. Similarly, in the PCS proceeding, AAR states: "While the microwave links are the backbone of the system, fiber is used when it is practically and economically feasible to do so. Thus, the railroads are not opposed to the use of fiber when practical; and, they will continue to do so increasingly."[26] We continue to believe that fiber optics and satellites are viable alternatives to spectrum for some systems and encourage their consideration where practicable. However, we are not requiring any system to convert to alternative media, but rather, have provided sufficient spectrum to accommodate those 2 GHz licensees that relocate to higher frequencies.[27]

20. Finally, the Spectrum Study sought to analyze the general feasibility of relocating existing 2 GHz fixed microwave users to higher frequency bands. The purpose of this study was not to identify specific relocation schemes for individual facilities.[28] While some commenters question the methodology of the study, they fail to offer alternative analyses. Other parties support its conclusion. For example, Comsearch, an entity that coordinates frequencies and provides engineering support for the design of microwave systems, states that it generally agrees with the results of the Spectrum Study and that the key to relocating stations is proper frequency engineering. We agree with Comsearch's comments and continue to believe that, where necessary to accommodate emerging technologies, most existing 2 GHz microwave facilities could be relocated to higher frequency bands with the same high degree of reliability.[29]

21. Throughout this proceeding we have recognized the important and essential functions, such as public safety and utility management communications, that 2 GHz fixed microwave operations now provide and indicated our intention to minimize the impact of our spectrum redevelopment plan on those services.[30] We disagree with those parties who argue that our reallocation and transition proposals would impair essential 2 GHz fixed microwave services and would result in a significant economic burden to 2 GHz licensees. We believe that the transition plan, as presented below, will minimize the impact on existing 2 GHz licensees and ensure that the important services they now provide will not be threatened. We also disagree with those parties that contend that any reallocation action would be premature until we identify the specific new services that would operate in the 2 GHz band. The intent of this redevelopment is to provide spectrum to meet the needs of new services currently under development and of

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[21] *Id.* at 11.

[22] We observe that the 2.160-2.162 GHz band is used by MDS systems for the upper end of channel 2 in certain locations. *See* 47 C.F.R. § 21.901(c). Our proposal was to allocate this 2 MHz to emerging technologies. We are adopting this proposal, and any authorization of additional stations to use this 2 MHz for MDS applied for after January 16, 1992 (the date of adoption of the *Notice)* shall be secondary to its use for emerging technologies.

[23] UTC filed a Petition for Issuance of Further Notice of Proposed Rule Making on May 1, 1992, in which it argues that the Commission's choice of candidate bands is flawed, that it didn't properly consider MDS and BAS spectrum, and that its interim licensing policy should be modified. As indicated above, the first two issues were discussed in the *Notice* and have been fully considered herein. The remaining issue, our interim licensing policy, also was discussed in the *Notice*, clarified in a Public Notice issued on May 14, 1992, *supra* note 5, and is fully considered herein.Accordingly, we dismiss as moot UTC's petition. However, the petition is accepted as a comment and the issues it raises are addressed herein.

[24] *See* Spectrum Study, *supra*, at 31.

[25] *Id.* at 29.

[26] AAR Comments in GEN Docket No. 90-314 at 15 (October 1, 1990).

[27] *See Notice, supra*, at para. 20. The Commission proposed a "blanket" waiver of eligibility for 2 GHz licensees to use other common carrier and private fixed microwave bands under the technical rules and coordination procedures applicable to each band. We will grant such waivers pending the outcome of the *Further Notice* proposing to restructure the higher fixed microwave bands (*see* note 10, *supra).*

[28] *See* Spectrum Study, *supra*, at 12.

[29] The FCC, in cooperation with the National Telecommunications and Information Administration (NTIA), would consider for relocation to the 1710-1850 MHz government band those few parties that cannot reliably use higher frequencies, *see* paras. 32-36, *infra*.

[30] *See Notice, supra*, at paras. 19 and 22-27.

future technologies. Therefore, we are allocating the 1850-1990, 2110-2150, and 2160-2200 MHz bands for the development and implementation of emerging technologies on a shared basis with the fixed service. The use of these allocations will be developed in ongoing and future proceedings that will address particular emerging technology services. When specific services are allocated in these bands we will adopt specific interference standards to allow for the sharing of this spectrum. These standards will protect operations of incumbent licensees from harmful interference caused by operations of emerging technology licensees.[31]

Accommodation of 2 GHz Fixed Microwave Services

22. Most fixed microwave interests opposed our proposal to make existing 2 GHz microwave operations secondary after a fixed date. Both UTC and Telocator submitted alternative plans for accommodating the transition of existing fixed microwave users to higher frequency bands. While UTC supports indefinite co-primary status for incumbent 2 GHz licensees, it recognizes that eventual transition of 2 GHz fixed microwave licensees may be necessary and suggests a ten year voluntary negotiation period followed by involuntary negotiations with the new users responsible for all relocation costs. Telocator's plan addresses many of the issues addressed by UTC's transition plan but does not propose a cut-off date for voluntary negotiations. Finally, the U.S. Senate passed an amendment to the bill making appropriations to the Commission that would have statutorily required a voluntary transition period of eight years.[32] The proposed UTC and Telocator transition plans and the Senate amendment are summarized at Appendix C.

23. We believe that the proposals contained in the Senate amendment and suggested by UTC and Telocator provide an appropriate transition framework for treating and reaccommodating incumbent 2 GHz operations. Accordingly, we are adopting most aspects of these alternatives and seek comment on other aspects. As more fully discussed below, we are adopting rules that define the requirements for an emerging technology licensee to involuntarily relocate an incumbent fixed microwave licensee and request comment on the length of the transition period and on how the Commission should resolve any disputes over involuntary relocation. We believe that the transition plan adopted herein will provide opportunity for the development of services using emerging technologies while preventing disruption of the service provided by the existing 2 GHz fixed microwave operations.

24. At any time beginning with the effective date of this *First Report and Order*, existing fixed microwave licensees will be permitted to negotiate voluntary relocation agreements and we will accommodate any agreed move to other bands consistent with our rules, *see* note 27, *supra*.[33] We emphasize, however, that such agreements will not be required. After an initial transition period, all existing fixed microwave licensees will retain co-primary status."[34] Such a transition period would commence upon the effective date of the Report and Order on the *Further Notice of Proposed Rule Making* in this docket dealing with re-channelization of the higher frequency microwave bands. If an emerging technology provider needs an incumbent's frequency, the Commission encourages the parties to negotiate a voluntary relocation agreement. Should that fail, the emerging technology service provider could request involuntary relocation of the incumbent. However, in that case, the emerging technology service provider must guarantee payment of all relocation expenses, build the new microwave facilities at the relocation frequencies, and demonstrate that the new facilities are comparable to the old as follows:

> (1) The emerging technology service provider must guarantee payment of all relocation costs. This includes all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee may incur as a result of operation in a different fixed microwave band or migration to other media. (2) The emerging technology service provider must complete all activities necessary for implementing the new facilities, including engineering, frequency coordination and cost analysis of the complete relocation procedure. This also includes identifying and obtaining, on the incumbents' behalf, new microwave frequencies or other facilities where applicable.[35] (3) The emerging technology service provider must build the new microwave system (or alternative) and test it for comparability to the existing 2 GHz system. The 2 GHz microwave licensee would not be required to relocate until the comparable alternative facilities are available to it for a reasonable time to make adjustments and ensure a seamless handoff. If within one year after the new facilities are in operation, they are demonstrated by the 2 GHz microwave licensee to be not comparable to the former facilities, the emerging technology service provider must remedy any deficiencies or pay to relocate the microwave licensee back to the former 2 GHz frequencies.

25. We solicit comment on how to define comparable alternative facilities. Specifically, we seek comment on whether a negotiated rule making might be beneficial in this process. This would give parties in this proceeding an opportunity to directly negotiate and recommend rules or guidelines to the Commission for resolving comparable facility issues. Further, we seek comment on dispute resolution processes in the event disputes arise over involuntary relocation, or disputes over the comparability of service on new microwave facilities in relocation bands. Thus, we seek comment on alternatives such as mediation

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[31] For example, in its *Notice of Proposed Rule Making* in GEN Docket No. 90-314, *supra* at paras. 109-113, the Commission proposed sharing criteria designed to protect fixed microwave operations from PCS interference with the same level of protection as they currently have from each other.

[32] This amendment was not included in the final appropriations bill.

[33] Any agreement entered into in advance of an allocation for an emerging technology service will not create any preference in the subsequent licensing process.

[34] In disputes involving interference between co-primary emerging technology and fixed microwave licensees, the facility first licensed will be afforded interference protection from the offending facility.

[35] These frequencies could be higher in the spectrum, or for difficult cases, within the Government 1.710-1.850 GHz band, *see* paras. 32-36, *infra*.

and arbitration, in addition to the possible use of negotiated rule making for determining definitions of comparability.

26. Finally, we will exempt existing 2 GHz fixed microwave operations licensed to the public safety and special emergency radio services -- including state and local governments, police, fire, and medical emergency communications -- from any involuntary relocation. Again we encourage those licensees to engage in voluntary relocation negotiations. Applications for new public safety microwave facilities in the 2 GHz band will be treated as any other request for new facilities. (See paragraph 31 below.)

Transition Period

27. We solicit comment on the length of the transition period that the Commission should adopt. The transition period should allow for the introduction of new services and provide for the relocation of the incumbents without undue disruption of services. As stated above, the Senate amendment would have required an eight year period and UTC has suggested a ten year period. Tentatively, we believe that the transition period should not be less than three years or more than ten years.[36] The transition period would commence on the adoption date of the Commission's Report and Order that addresses issues concerning the channeling of the higher fixed microwave bands available for the relocation of incumbent 2 GHz fixed microwave licensees, raised in the *Further Notice of Proposed Rule Making* in this proceeding. In addition, we seek comment on whether no transition may be appropriate in some instances, particularly in the case of unlicensed devices or services covered by blanket licenses which may operate in these bands. In such cases, we request comment on whether affected fixed users should be given priority access to government spectrum or other 2 GHz spectrum if they cannot be accommodated in higher bands.

28. In order to ensure that an incumbent licensee would not be faced with a sudden or unexpected request for involuntary negotiations, we seek comment on whether it would be appropriate to also provide a minimum time period for voluntary negotiations after the grant of a license to an emerging technology service provider. For example, in the case of a three year transition period, it is possible that licensees for a particular service may be assigned near the end of or even after the transition period. In that case, should we provide a one year minimum period for voluntary negotiations between the parties? This would ensure that an incumbent licensee would not be faced with a precipitous demand for involuntary negotiations after the three year period. We also question whether in the case of a more lengthy transition period, in those few geographic areas where there may be little or no spectrum available, waiting for voluntary negotiations may frustrate the introduction of services using new technologies. We request comment on whether in such cases a shorter transition period, but no less than three years, should be observed to address these situations if it can be shown that the voluntary negotiations have not succeeded.

29. We will encourage spectrum sharing between emerging technologies services and incumbent 2 GHz fixed microwave users whenever technically feasible. As the commenters point out, the feasibility of spectrum sharing between new services and fixed microwave services has not been fully determined and will depend on the technical design of individual new systems and services.[37] Further, as commenters also note, we have not determined the specific services that will be permitted to operate on 2 GHz emerging technologies frequencies. We are hopeful, however, that spectrum sharing techniques for some services, such as those being developed by PCS proponents such as APC and Millicom, Inc. may prove workable. The success of those techniques could allow co-primary operation of some emerging technologies with existing fixed microwave services on a non-interference basis without the need for any relocation agreements. We note that spectrum sharing and interference standards that relate to PCS are being addressed in the *PCS Notice*.[38] As other future services that use emerging technologies develop, sharing by those will be addressed in subsequent rule making proceedings.

Fixed Microwave Licensing Policy

30. In the staff's May 14, 1992, Public Notice, *see* note 5, *supra*, the kinds of modifications and expansions by existing microwave licensees that would not affect their status with respect to emerging technology licensees were set forth. We are faced, however, with two divergent objectives. On the one hand, we want to minimize the effect of our reallocation on existing microwave users. Existing licensees must be allowed to operate without devaluing the usefulness of their 2 GHz facilities. On the other hand, we must provide emerging technology licensees with a stable environment in which to plan and implement new services.

31. As stated in the Public Notice, new facilities will be licensed only on a secondary basis.[39] Existing 2 GHz fixed facilities, licensed before January 16, 1992, can make certain modifications and minor extensions and retain primary status.[40] Major extensions or expansions would be considered secondary, unless a special showing of need is

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[36] Commenters should provide a comparative analysis of the specific economic and technical factors that justify the particular transition period(s) that they support. For example, commenters should clarify the estimated costs and time involved in any relocation action. We also seek comment on whether different transition periods may be appropriate for certain areas (i.e., urban areas versus rural) or due to certain technical considerations (i.e., length of links, coastal effects, etc...).

[37] We note that in some instances sharing between fixed microwave and new services may be difficult. For example, AMSC and Apple Computer, Inc. indicate that sharing may not be feasible with MSS and unlicensed data-PCS, respectively.

[38] *See* note 11, *supra*.

[39] Century Telephone Enterprises, Inc. (Century) filed a Petition for Reconsideration on March 20, 1992, requesting that the Commission continue to license new 2 GHz microwave systems on a primary basis. Similarly, in a Petition for Clarification filed on March 23, 1992, AAR requested that we clarify that new 2 GHz microwave systems may be granted on a primary basis. The issues raised by Century's and AAR's petitions were clarified in a *Public Notice* issued on May 14, 1992, *supra* note 5, and also are discussed herein. Accordingly, these two petitions are dismissed as moot but are accepted as comments and have been considered in this proceeding.

[40] This includes facilities licensed on a primary basis in accordance with the staff's May 14, 1992, Public Notice. Acceptable modifications include: minor modifications, changes in antenna azimuth, antenna beamwidth, antenna height, authorized power, channel loading, emission, station location, and ownership or control; reduction in authorized frequencies; or addition of frequencies not in the 2 GHz band.

made to justify primary status. This policy gives fixed microwave licensees significant flexibility, and together with our voluntary/involuntary agreement provisions, appropriately balances and satisfies our divergent objectives.

Use of Government Spectrum for Relocation

32. In the *Notice*, we requested comment on the feasibility of using government spectrum in the 1.71-1.85 GHz band for relocation of existing 2 GHz operations, noting that the Spectrum Study did not examine the availability or suitability of government spectrum for relocation of existing 2 GHz operations.[41] Subsequently we requested comment on a March 1992 NTIA report entitled "Federal Spectrum Usage of the 1710-1850 and 2200-2290 MHz Bands."[42] In that report, NTIA notes that, in addition to fixed microwave links, government uses of this band include tracking, telemetry and command uplink and downlink for military satellites; fixed and mobile military tactical communications; radio astronomy; and telemetry and timing signals for advanced weapons development. NTIA also states that many additional uses are classified, and therefore not accounted for in calculations of government usage.

33. NTIA also notes that Federal use of the 1.71-1.85 GHz and 2.20-2.29 GHz bands have increased at 15% and 4% per year, respectively. It further states that approximately 63% of the assignments in the upper band are for mobile and space services. NTIA concludes that the potential to use 2 GHz government spectrum for non-government fixed microwave communications is limited, but possible in some instances, and that it will work with the Commission to determine if some access can be provided.[43] NTIA emphasizes that the Commission should not delay reallocating spectrum for emerging technologies pending establishment of access procedures.

34. Parties addressing use of government spectrum generally state that the 1.71-1.85 GHz band should be made available for relocation of existing 2 GHz non-government fixed microwave licensees, or alternatively, for use by 2 GHz emerging technologies.[44] Some parties, such as API, state that government bands could support non-government fixed operations on a co-primary basis. Pacific Telesis Group states that additional study is needed, but argues that Government spectrum should be made available to new users if it is not fully occupied. Rolm Systems maintains that at least the longer microwave links that cannot be relocated to higher frequencies should be given access to government spectrum.

35. On August 11, 1992, NTIA released an additional report entitled, "Feasibility of Relocating Non-Government Fixed Systems into the 1710-1850 MHz Band" ("NTIA Feasibility Report").[45] This report responds to questions raised regarding the possible use of 2 GHz government spectrum for reaccommodation of non-government 2 GHz fixed microwave operations. The "NTIA Feasibility Report" contains three main conclusions: First, the 1710-1850 MHz band is used intensely by government operations; second, there is sufficient spectrum in most parts of the United States to accommodate a limited number of 2 GHz microwave links in the 1710-1850 MHz band; and third, in most geographic areas, fixed microwave links at 6 GHz can be engineered to be as reliable as links at 2 GHz.[46] NTIA states that it will cooperate with the Commission to provide spectrum in the 1710-1850 MHz band for relocating fixed microwave links that cannot be re-engineered to operate reliably at 6 GHz.[47] NTIA further states that it will cooperate with the Commission to establish technical rules and coordination procedures necessary to identify such links, evaluate the feasibility of relocation in the 1710-1850 MHz band, and if feasible, implement such relocation.[48]

36. We have instructed the staff to develop, with NTIA, a process to accommodate in the 2 GHz government band those non-government 2 GHz fixed microwave facilities that technically cannot be accommodated in higher bands. Consistent with our transition plan, we would expect this process to be used on a case-by-case basis, as services using emerging technologies grow and need more spectrum. This process will provide a safety net for those licensees operating difficult communications paths in areas where demand for new services exceeds that which can be supplied without displacing any existing licensees.[49]

Tax Certificates

37. In our *Notice*, we raised the possibility of issuing tax certificates as a means of encouraging current fixed microwave licensees to migrate. Our transition plan now places responsibility for all costs to be borne either (1) as voluntarily agreed to by the parties, or (2) by the emerging technology licensee, if the relocation is involuntary. Under this approach, no existing fixed microwave licensee would be required to pay relocation costs. Some commenters state that tax certificates, if used to encourage migration both to other bands and other media, could remove a potential financial disincentive to relocation where a 2 GHz fixed user may receive a capital gain due to a shift in its oper-

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[41] *See Notice, supra*, at para. 21.

[42] NTIA Report 92-285.

[43] *See also* letter of May 4, 1992, from Thomas J. Sugrue, Acting Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Alfred C. Sikes, FCC Chairman.

[44] Many parties, both incumbent 2 GHz fixed microwave interests, and emerging technologies proponents, suggest that the Commission actively pursue access to the 1.71-1.85 GHz band.

[45] NTIA Report 92-286. This report was placed in the ET Docket No. 92-9 file in August.

[46] In this regard, the "NTIA Feasibility Report" at 43 estimates that only 2% of the 30,000 2 GHz fixed microwave facilities could not operate reliably in higher microwave bands.

[47] *See* Letter dated August 11, 1992, from Gregory F. Chapados, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to Alfred C. Sikes. This letter accompanied the "NTIA Feasibility Report."

[48] *Id.*

[49] AAR, the Large Public Power Council, and API filed a Petition to Suspend Proceeding on April 10, 1992, in which they request that this proceeding be suspended until: 1) the Commission requests access to government spectrum and receives a response from NTIA; 2) the Commission's Office of Engineering and Technology (OET) evaluates the 2 GHz government fixed band using the same criteria it used to evaluate the 2 GHz non-government fixed band; and, 3) interested parties have an opportunity to comment on the OET evaluation. In view of the recent "NTIA Feasibility Report" and NTIA's agreement to cooperate with the Commission in identifying and relocating those few 2 GHz non-government fixed microwave links that

ations to another band or to a non-spectrum alternative.[50] They suggested that, under those circumstances, tax certificates could be used to defer the payment on such a gain and thus allow the fixed user to relocate in a more expeditious manner. Accordingly, we request more specific comment on how tax certificates could be used under the transition plan adopted herein. We also seek comment on whether the negotiated rule making process could be used to develop specific guidelines and legal justifications for using the tax certificate in this context.

Use of Emerging Technologies Bands

38. Many commenters point out that the extent to which spectrum needs to be set aside, the degree to which sharing could occur, and estimates on the extent of relocation of 2 GHz incumbents, will depend on the specific services designated to use the emerging technologies bands. These parties argue that the *Notice* overlooks this aspect and therefore the Commission should issue a Further Notice of Proposed Rule Making that addresses specific services and their associated service rules.

39. As discussed in paragraph 21, *supra*, we do not believe it necessary to identify the exact services that would be permitted to operate in the emerging technologies bands prior to making a general spectrum allocation. The rationale for our action making spectrum available for emerging technologies is to accommodate rapidly new services as the technology advances and these services become feasible. These could be additional PCS, or even future MSS, if they can co-exist with other users of the 2 GHz band.[51] We believe that demand, not our predictions, should dictate what services eventually operate in the bands we are reallocating in this proceeding. We do not want to predefine all services and specific technologies that might operate in these bands, as we believe this would defeat our goal of conserving suitable spectrum to foster development of new technologies that will allow U.S. industry to move quickly and keep pace with telecommunications developments throughout the world. We note, too, that service rules for the most developed of emerging technologies, PCS, are being addressed concurrently in GEN Docket 90-314.

IV. CONCLUSION

40. This *First Report and Order* is the initial phase in our effort to redevelop spectrum so that emerging technologies can be implemented. This plan should result in no disruption to 2 GHz fixed microwave operations and should result, particularly in the case of fixed microwave users that engage in voluntary negotiations, in no unacceptable impact to incumbent users. Subsequent actions in this and other proceedings will complete the rechannelization of the higher frequency fixed microwave bands to accommodate any relocated 2 GHz operations and develop service rules. We also have requested comment in the *Third Notice of Proposed Rule Making* portion of this item on the appropriate transition period to emerging technologies and on how the Commission should resolve any disputes over involuntary relocation.

V. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, that the petitions filed by Century Telephone Enterprises, Inc. on March 20, 1992, Association of American Railroads on March 23, 1992, Utilities Telecommunications Council on May 1, 1992, and Association of American Railroads, Large Public Power Council, and American Petroleum Institute on April 10, 1992, ARE DISMISSED; and the petitions filed by Metropolitan Water District of Southern California and Questar Service Corporation on June 24, 1992, Commonwealth Edison Company, Montana Power Company, and Public Service Electric and Gas Company on June 29, 1992, Seattle City Light on August 17, 1992, and Takoma Public Utilities on August 19, 1992, ARE DENIED.

42. Also, IT IS ORDERED, that Parts 2, 21, 22, and 94 of the Commission's Rules and Regulations ARE AMENDED as specified below, effective 90 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 303(c), (g), and (r), of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 303(c), (g), and (r).

VI. PROCEDURAL MATTERS

First Report and Order: Final Regulatory Flexibility Analysis

43. Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rule Making* in ET Docket No. 92-9. Written comments on the proposals in the *Notice*, including the Regulatory Flexibility Analysis, were requested.

44. *Need for and Objective of Rules.* Our objective is to provide spectrum for the development and implementation of new innovative technologies and services, while preventing disruption to current users of that spectrum. Providing spectrum for emerging technologies is necessary in order to bring new services to the public, and to foster U.S. competitiveness in the global telecommunications marketplace.

45. *Issues Raised by the Public in Response to the Initial Analysis.* Many parties supported reallocating spectrum to accommodate emerging technologies. Although most suggested modifications to specific proposals set forth in the *Notice*, they did not suggest modifications specifically to the initial regulatory flexibility analysis. As a result, we have modified our proposals as appropriate. For example, in the *Notice* we had proposed to grant applications for new facilities on a secondary basis; we now feel that it would be less disruptive to existing 2 GHz fixed microwave licensees

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can not operate reliably in bands above 3 GHz, we are dismissing this petition as moot. The petition is treated as a comment and the issues it raises are addressed herein.

[50] *See* comments of Alcatel at 25; American Personal Communications at 20-21; Baltimore Gas & Electric at 4; CTIA at 5; Centerior Energy Corporation at 5; COMSEARCH at 8-9; Edison Electric Institute at 23-24; GTE Services at 19-22; NYNEX Mobile at 6; OCUM Corporation at 19-20; OPASTCO at 9; Rochester Telephone at 4; Rocky Mountain Telephone Association at 19-21; Southern Natural Gas at 2; Telocator at 12-13; Southwestern Bell at 23-25; US WEST at 14-15; Vanguard Cellular at 12-14; and Williams Natural Gas at 3. *Cf.* American Public Power Association at 18-19.

[51] AMSC suggests that emerging technologies spectrum be set aside for MSS.

if applications for new facilities that modify or expand existing facilities in some instances are granted on a primary basis.

46. *Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives.* We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary in order to ensure that the public receives the benefits of innovative new services in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities. The Secretary shall send a copy of this *First Report and Order and Third Notice of Proposed Rule Making* to the Chief Counsel for Advocacy of the Small Business Administration.

Third Notice of Proposed Rule Making: Regulatory Flexibility Analysis

47. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason For Action

This rule making proceeding is initiated to obtain comment regarding the appropriate transition period to emerging technologies in the 2 GHz band and how to resolve any disputes should they arise over involuntary relocation of incumbent 2 GHz fixed microwave operations.

B. Objective

The objective of this proposal is to ensure that a timely and equitable transition between fixed microwave and emerging technologies uses takes place in the 2 GHz band.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303 (f), 303(g).

D. Description, Potential Impact, and Number of Small Entities Affected

Depending upon the length of the transition period, this proposal would potentially impact between several hundred and several thousand existing private and common carrier fixed microwave users in the 2 GHz band. This proposal may provide new opportunities for radio manufacturers and suppliers of radio equipment, some of which may be small businesses, to develop and sell new equipment. We are unable to quantify other potential effects on small entities. We invite specific comments on this point by interested parties.

E. Reporting, Record Keeping, and Other Compliance Requirements

None.

F. Federal Rules That Overlap, Duplicate, or Conflict With This Rule

None.

G. Significant Alternatives

If promulgated, this proposal will provide a desirable transition between existing and new uses of the 2 GHz band. We solicit comment on the most appropriate transition period and on how to resolve any disputes should they arise over involuntary relocation of incumbent 2 GHz fixed microwave operations.

48. *Other Matters.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

49. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

50. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **January 13, 1993,** and reply comments on or before **February 12, 1993.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine comments must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

51. For further information concerning this rule making proceeding contact Fred Lee Thomas at (202) 653-6204 or Tom Mooring at (202) 653-8114, Office of Engineering and Technology, Federal Communications Commission, Washington, DC 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A: FINAL RULES

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. § 2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*	*	
			1850-1990	1850-1990 FIXED. MOBILE. NG153	PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	EMERGING TECHNOLOGIES
			1990-2110 US90 US111 US219 US222	1990-2110 FIXED. MOBILE. US90 US111 US219 US222 NG23 NG118	AUXILIARY BROADCAST (74). CABLE TELEVISION (78).	
			2110-2200	2110-2150 FIXED. MOBILE. US111 NG23 NG153	 DOMESTIC PUBLIC FIXED (21). PUBLIC MOBILE (22). PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	EMERGING TECHNOLOGIES
				2150-2160 FIXED. NG23	MULTIPOINT DISTRIBUTION (21). PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	
				2160-2200 FIXED. MOBILE. NG23 NG153	 DOMESTIC PUBLIC FIXED (21). PUBLIC MOBILE (22). PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	EMERGING TECHNOLOGIES
			US111 US252			
*	*	*	*	*		

b. NG153 - The 1850-1990 MHz, 2110-2150 MHz, and 2160-2200 MHz bands are reserved for future emerging technologies on a co-primary basis with the fixed and mobile services. Allocations to specific services will be made in future proceedings.

II. Title 47 of the Code of Federal Regulations, Part 21, is amended to read as follows:

1. The authority citation continues to read as follows:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

2. Subpart B of Part 21 is amended by adding § 21.50 to read as follows:

§ 21.50 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Domestic Public Fixed Radio Services to emerging technologies.

(a) Licensees proposing to implement services using emerging technologies may negotiate with Domestic Public Fixed Radio licensees in these bands for the purpose of agreeing to terms under which the existing licensees would relocate their operations to other fixed microwave bands or other media, or alternatively, to accept a sharing arrangement with the emerging technology licensee that may result in an otherwise impermissible level of interference to the existing licensee's operations.

(b) Domestic Public Fixed Radio licensees will maintain primary status in these bands until [Date: end of transition period to be determined in the Second Report and Order]. After [Date] Domestic Public Fixed Radio licensees will maintain primary status in these bands unless and until an emerging technology service licensee requests mandatory relocation of the fixed microwave licensee's operations in these bands. The Commission will amend the operating license of the fixed microwave operator to secondary status if the following requirements are met:

(1) The service licensee using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service licensee completes all activities necessary for implementing the new microwave facilities, including identifying and obtaining, on the incumbents' behalf, new microwave frequencies, engineering, frequency coordination, and cost analysis of the complete relocation procedure;

(3) The emerging technology service licensee builds the new microwave system and tests it for comparability with the existing 2 GHz system;

(4) The 2 GHz microwave licensee is not required to relocate until the comparable alternative facilities are available to it for a reasonable time to make adjustments and ensure a seamless handoff; and

(5) If within one year after the transition to new facilities the 2 GHz microwave licensee demonstrates that they are not comparable to the former facilities, the emerging technology service provider must remedy the defects or pay to relocate the microwave licensee back to its former 2 GHz frequencies.

(c) (Reserved.)

(d) Domestic Public Fixed Radio operations that are relocated to other fixed microwave bands will be subject to the applicable rules for those bands.

III. Title 47 of the Code of Federal Regulations, Part 22, is amended to read as follows:

1. The authority citation continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted. and 307, unless otherwise noted.

2. Subpart B of Part 22 is amended by adding § 22.50 to read as follows:

§ 22.50 Transition of the 2.11-2.13 and 2.16-2.18 GHz bands from Public Mobile Service to emerging technologies.

(a) Licensees proposing to implement services using emerging technologies may negotiate with Public Mobile Service licensees in this band for the purpose of agreeing to terms under which the existing licensees would relocate their operations to other fixed microwave bands or other media, or alternatively, to accept a sharing arrangement with the emerging technology licensee that may result in an otherwise impermissible level of interference to the existing licensee's operations.

(b) Public Mobile Service licensees will maintain primary status in these bands until [Date: end of transition period to be determined in the Second Report and Order]. After [Date] Public Mobile Service licensees will maintain primary status in these bands unless and until an emerging technology service licensee requests mandatory relocation of the fixed microwave licensee's operations in these bands. The Commission will amend the operating license of the fixed microwave operator to secondary status if the following requirements are met:

(1) The service licensee using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service licensee completes all activities necessary for implementing the new microwave facilities, including identifying and obtaining, on the incumbents' behalf, new microwave frequencies, engineering, frequency coordination, and cost analysis of the complete relocation procedure;

(3) The emerging technology service licensee builds the new microwave system and tests it for comparability with the existing 2 GHz system;

(4) The 2 GHz microwave licensee is not required to relocate until the comparable alternative facilities are available to it for a reasonable time to make adjustments and ensure a seamless handoff; and

(5) If within one year after the transition to new facilities the 2 GHz microwave licensee demonstrates that they are not comparable to the former facilities, the emerging technology service provider must remedy the defects or pay to relocate the microwave licensee back to its former 2 GHz frequencies.

(c) (Reserved.)

(d) Public Mobile Service operations that are relocated to other fixed microwave bands will be subject to the applicable rules for those bands.

IV. Title 47 of the Code of Federal Regulations, Part 94, is amended to read as follows:

1. The authority citation continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Part 94, Subpart B is amended by adding § 94.59 to read as follows:

§ 94.59 Transition of the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands from Private Operational-Fixed Microwave Service to emerging technologies.

(a) Licensees proposing to implement services using emerging technologies may negotiate with Private Operational-Fixed Microwave Service licensees in these bands for the purpose of agreeing to terms under which the existing licensees would relocate their operations to other fixed microwave bands or other media, or alternatively, to accept a sharing arrangement with the emerging technology licensee that may result in an otherwise impermissible level of interference to the existing licensee's operations.

(b) Private Operational-Fixed Microwave Service licensees will maintain primary status in these bands until [Date: end of transition period to be determined in the Second Report and Order]. After [Date] Private Operational-Fixed Microwave Service licensees will maintain primary status in these bands unless and until an emerging technology service licensee requests mandatory relocation of the fixed microwave licensee's operations in these bands; however, public safety licensees will be exempt from any mandatory relocation. The Commission will amend the operating license of the fixed microwave licensee to secondary status if the following requirements are met:

(1) The service licensee using an emerging technology guarantees payment of all relocation costs, including all engineering, equipment, site and FCC fees, as well as any reasonable, additional costs that the relocated fixed microwave licensee might incur as a result of operation in another fixed microwave band or migration to another medium;

(2) The emerging technology service licensee completes all activities necessary for implementing the new microwave facilities, including identifying and obtaining, on the incumbents' behalf, new microwave frequencies, engineering, frequency coordination, and cost analysis of the complete relocation procedure;

(3) The emerging technology service licensee builds the new microwave system and tests it for comparability with the existing 2 GHz system;

(4) The 2 GHz microwave licensee is not required to relocate until the comparable alternative facilities are available to it for a reasonable time to make adjustments and ensure a seamless handoff; and!

(5) If within one year after the transition to new facilities the 2 GHz microwave licensee demonstrates that they are not comparable to the former facilities, the emerging technology service provider must remedy the defects or pay to relocate the microwave licensee back to its former 2 GHz frequencies.

(c) (Reserved.)

(d) Private Operational-Fixed Microwave Service operations that are relocated to other fixed microwave bands will be subject to the applicable rules for those bands.

APPENDIX B: COMMENTING PARTIES

Parties Filing Comments in Response to the *Notice* in ET Docket No. 92-9:

1. Advanced MobileComm, Inc.
2. Alascom, Inc., Telephone Utilities of Eastern Oregon, Inc. and Telephone Utilities of Washington, Inc.
3. Alcatel Network Systems, Inc.
4. ALLTEL Companies
5. American Gas Association
6. American Personal Communications
7. American Petroleum Institute
8. American Public Power Association
9. American Telephone and Telegraph Company
10. Ameritech
11. AMSC Subsidiary Corporation
12. Apple Computer, Inc.
13. Arizona Public Service Company
14. Associated Builders and Contractors
15. Associated PCN Company
16. Association for Maximum Service Television, Inc.
17. Association of American Railroads
18. Baltimore Gas and Electric Company
19. Basin Electric Power Cooperative
20. BellSouth Corporation
21. Bluegrass Cellular, Inc.
22. Brazos Electric Power Cooperative, Inc.
23. California Microwave, Inc.
24. Capital Cities/ABC, Inc.
25. CBS Inc.
26. Cellular Telecommunications Industry Association
27. Cellwave, Inc.
28. Centel Corporation

29. Centerior Energy Corporation
30. Central and South West
31. Central Maine Power Company
32. Central Power and Light Company
33. Century Telephone Enterprises, Inc.
34. Citizens Utilities Company of California
35. Coastal Corporation, The
36. Communications Satellite Corporation
37. COMSEARCH
38. Consolidated Edison Company of New York, Inc.
39. Corn Belt Power Cooperative
40. Cox Enterprises, Inc.
41. Cylink Corporation
42. Edison Electric Institute
43. EDS Corporation
44. El Paso Natural Gas Company
45. Enron Interstate Pipelines
46. Ericsson Corporation, The
47. Fleet Call, Inc.
48. GTE Service Corporation
49. Harris Corporation - Farinon Division Hewlett-Packard Company
51. Hughes Network Systems, Inc.
52. IEEE 802 Local Area Network Standards Committee
53. Impulse Telecommunications Corporation
54. Interactive Technologies, Inc.
55. International Mobile Machines
56. Interstate Natural Gas Association of America
57. JSM Tele-Page, Inc.
58. KAMO Electric Cooperative, Inc.
59. Knight, Bill
60. Large Public Power Council
61. Legislative Affairs Committee Region-20 Public Safety Review Committee
62. McCaw Cellular Communications, Inc.
63. MCI Telecommunications Corporation
64. Mega-Tel Cellular Limited Partnership
65. Metropolitan Water District of Southern California
66. Millicom, Inc.
67. Miscellco Communications, Inc.
68. Montana Power Company, The
69. Motorola Inc.
70. National Association of Broadcasters, Radio-Television News Directors Association, Cable-Satellite Public Affairs Network, Association for Maximum Service Television, Inc., and Turner Broadcasting System, Inc.
71. National Broadcasting Company, Inc.
72. National Rural Electric Cooperative Association
73. National Spectrum Managers Association, Inc.
74. National Telecommunications and Information Administration
75. National Telephone Cooperative Association
76. NYNEX Mobile Communications Company
77. North American Telecommunications Association
78. Northern Telecom Inc.
79. OCUM Corporation
80. Omnipoint Corporation, Oracle Data Publishing, Inc., and McCaw Cellular Communications, Inc.
81. Organization for the Protection and Advancement of Small Telephone Companies, The
82. PacifiCorp
83. Pacific Telesis Group
84. Personal Communications Network Services of New York, Inc.
85. Public Power Council
86. Public Safety Microwave Committee
87. Public Service Company of Oklahoma
88. Public Service Telephone Company
89. Public Utilities Commission of the State of Colorado
90. Questar Service Corporation
91. Rivkin, Steven R.
92. Rochester Telephone Corporation
93. Rocky Mountain Telecommunications Association
94. ROLM
95. Rose Communications, Inc.
96. Rypinski, Chandos A.
97. R&D Cellular, Inc.
98. San Diego, the City of, and San Diego Gas & Electric
99. Scripps Howard Broadcasting Company
100. SCS Mobilecom, Inc.
101. Sho-Me Power Electric Cooperative
102. Society of Broadcast Engineers, Incorporated
103. Sooner Cellular, Inc.
104. Southwestern Bell Corporation
105. Southwestern Electric Power Company
106. Spatial Communications, Inc.
107. SpectraLink Corporation
108. SR Telecom, Inc.
109. Sterling Cellular Limited Partnership
110. Sunflower Electric Power Corporation
111. Sunshine Cellular
112. Telecommunications Industry Association Fixed Point-to-Point Communications Section

113. Telecommunications Industry Association Mobile Communications Division

114. Telephone and Data Systems Inc.

115. Tel/Logic Inc.

116. Telesciences, Inc.

117. Telocator

118. Texas Gas Transmission Corporation

119. Texas Wired Music, Inc. and Taft Broadcasting Company

120. Time Warner Telecommunications Inc.

121. TRX Transportation Telephone Company

122. United States Department of Energy

123. United States Telephone Association

124. United Telephone Companies

125. U S WEST, Inc.

126. Utilities Telecommunications Council

127. Valero Transmission Company

128. Vanguard Cellular Systems, Inc.

129. Virginia, Maryland and Delaware Association of Electric Cooperatives

130. Western Resources, Inc.

131. Westinghouse Broadcasting Company, Inc.

132. Wireless Cable Association International, Inc.

133. Wireless Information Networks Forum

Parties Filing Reply Comments in Response to the *Notice* in ET Docket No. 92-9:

1. Alcatel Network Systems, Inc.

2. AMSC Subsidiary Corporation

3. American Personal Communications

4. American Petroleum Institute

5. Apple Computer, Inc.

6. Association of American Railroads

7. AT&T

8. Cablevision Systems Corporation

9. Capital Cities/ABC, Inc.

10. Centel Corporation

11. Central Nebraska Public Power and Irrigation District

12. COMSAT0

13. Corporate Technology Partners

14. Edison Electric Institute

15. GE American Communications, Inc.

16. Leslie Taylor Associates

17. McCaw Cellular Communications, Inc.

18. Motorola, Inc.

19. National Association of Broadcasters, Radio-Television News Directors Association, Cable-Satellite Public Affairs Network, Association for Maximum Service Television, Inc., Turner Broadcasting System, Inc.

20. National Telecommunications and Information Administration

21. Pacific Telesis Group

22. Personal Communications Network Services of New York, Inc.

23. Primestar Partners L.P.

24. Public Safety Microwave Committee

25. Satellite Broadcasting and Communications Association

26. SCS Mobilecom, Inc.

27. Telephone and Data Systems, Inc

28. Telesciences, Inc.

29. Telocator

30. Utilities Telecommunications Council

APPENDIX C: PROPOSED TRANSITION PLANS

UTC's proposed transition plan:

"To the extent there is concern over the feasibility of voluntary negotiations, [the Commission should] provide for an involuntary relocation program, to commence 10 years from now, based on the MMDS/ITFS relocation plan adopted in GEN Doc. 90-54:

(1) A new user may request involuntary modification of an existing user's license to specify operation on different frequencies;

(2) The new user is responsible for all relocation costs, and must set up an escrow account or buy a performance bond to guarantee relocation costs;

(3) The proposed system must provide equal or better reliability than the existing system;

(4) Existing user has an opportunity to oppose the relocation proposal; and

(5) If the new facilities prove to be unsatisfactory in practice, the existing user must be relocated back to its original facilities at the new user's expense.[52]

Telocator's proposed transition plan:

(1) No microwave users should be required to cease 2 GHz operations until suitable alternative facilities are implemented and tested;

(2) A transition plan framework should be utilized rather than current users' primary status expiring on a fixed date;

[52] *See* UTC's letter, "Recommended FCC Action Plan for Accommodating New Technologies," dated March 24, 1992.

(3) Extensions of current users' co-primary status should be provided in cases in which there is no initial interest in emerging technologies;

(4) Government spectrum at 1710-1850 MHz should be considered as a relocation destination for current 2 GHz licensees;

(5) There should be equal treatment of all existing 2 GHz fixed microwave, with the exception of police, fire and emergency medical operations, which would be exempt from any relocation;

(6) Spectrum sharing should be used initially and wherever possible;

(7) 2 GHz microwave and emerging technology licensees should be free to negotiate mutually acceptable agreements for spectrum accommodation or relocation;

(8) Tax certificates should be used encourage accommodation of emerging technologies; and

(9) Narrow-band microwave facilities in the 2110-2200 MHz band and new non-licensed applications in the emerging technologies bands should be given special consideration.[53]

Senate Amendment:

(1) The Commission shall not redesignate, from primary to secondary, any use of the frequencies between 1.85 and 2.20 GHz by a qualified fixed microwave entity;

(2) The Commission may permit frequencies between 1.85 and 2.20 GHz that are allocated on a primary basis to fixed microwave service to be used on a shared basis, except that any entity that shares the frequencies between 1.85 and 2.20 GHz with a qualified fixed microwave entity shall bear the burden of eliminating any harmful interference to an existing fixed microwave system;

(3) Any newly licensed fixed microwave system, or modification of an existing such system, operating on frequencies between 1.85 and 2.20 GHz shall bear the burden of eliminating interference to already licensed emerging technology systems;

(4) Any license for a new fixed microwave facility, or modification of or addition to an existing such system, operating on frequencies between 1.85 and 2.20 GHz shall be granted on a primary basis, unless no other qualified private fixed microwave entity is operating on those frequencies on a primary basis;

(5) The Commission shall not deny any application for a license for a new fixed microwave system, or modification of or addition to an existing such system, seeking to operate on frequencies between 1.85 and 2.20 GHz, for the purpose of preserving the availability of frequencies for emerging telecommunications technologies or other uses;

(6) The Commission shall not impede or restrict the ability of fixed microwave entities operating on frequencies between 1.85 and 2.20 GHz, or of licensees or proponents of emerging technologies, to enter into voluntary negotiations for the purpose of optimizing efficient use of the spectrum, including, but not limited to migration of facilities to other frequencies or media; (7) At a date no earlier than 8 years after adoption of final rules in this proceeding, proposals for relocation of *either* fixed microwave or emerging technologies operations may be submitted to the Commission, subject to conditions intended to ensure that there is virtually no adverse impact on the service provided by relocated operation or the entity owning that operation; and

(8) If a proposed relocation is approved by the Commission, the Commission shall retain jurisdiction to resolve all remaining disputes to ensure that the conditions in (7), above, are met.[54]

[53] *See* Telocator's comments at 3-4.
[54] *See* 138 Cong. Rec. S10346 (July 27, 1992).

Separate Statement
of
Commissioner Ervin S. Duggan

In the Matter of Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies

Despite my early misgivings, I am satisfied that we are moving forward with a balanced approach in this proceeding. Indeed, the decisions and proposals we adopt today will provide the spectrum necessary to hasten the launch of new and promising technologies, while ensuring maximum sensitivity to the needs of incumbent users who have abided by our rules.

It is no secret that this has been a contentious proceeding, involving intense lobbying by the parties most at risk--- incumbent microwave licensees, on the one hand, and new technology providers such as Personal Communications Service (PCS) proponents, on the other. Both sides in this debate have strong policy arguments, both have strong allies on Capitol Hill.

From the beginning of this proceeding last January, I have signalled my strong desire to treat incumbent users fairly. That concern stems not only from a normal sense of fairness, but also from a longstanding principle embodied in the Fifth Amendment: "nor shall private property be taken for public use, without just compensation." I do not want to suggest that incumbent licensees hold permanent or private property rights, but I am convinced that they do have a right to reasonable compensation, ample transition periods, and fully adequate substitute spectrum for their move.

I am satisfied that, in this item, the Commission adopts adequate procedural safeguards to protect the interests of these incumbent licensees. In particular, incumbent licensees who are forced to move will be provided with guaranteed payment of their relocation costs; new technology service providers, moreover, must build the relocated facilities and test them for comparability to the incumbent's existing facilities. If the relocated facilities aren't comparable, the new technology provider must remedy any defects or pay to relocate the incumbent back to its former location. Reasonable extensions of existing microwave service will also be entitled to these benefits of co-primary status.

In addition, we seek comment on several possible plans, ranging from three to 10 years, concerning the appropriate

length of time to allow for voluntary negotiations between new technology providers and existing users. We also seek comment on an additional proposal to mandate a one-year voluntary negotiation period for all incumbent licensees, which will ensure fair treatment for microwave licensees located in smaller communities or on outlying spectrum bands.

As we move forward with these measures, I believe we should give credit to the efforts of Senator Hollings and others to ensure that public safety users and other current users of 2 Gigahertz spectrum have been given a fair hearing. In our eagerness to encourage and promote exciting new technologies, the Commission must not overlook the needs of equally important existing communications service providers and the many consumers who have come to rely on these services. Microwave licensees, after all, have good reason to fear the Commission's efforts to relocate them in favor of new, unproven technologies; they remember with some bitterness the reallocation of the 12 Gigahertz band many years ago to make room for Direct Broadcast Satellite (DBS) service--- a service which has yet to reach consumers.

My ongoing concern for current licensees, however, does not mean that I lack interest or enthusiasm for new technologies. To the contrary, I want to do all we can to encourage innovative new communications services.

A few weeks ago I visited Apple Computer's headquarters in Cupertino, California. I was awed by the new products and services that I saw there: services and products that are ready to be born. Unlike the slow transition to DBS, I'm convinced that PCS and data-PCS services can be brought quickly to the marketplace. The potential benefits of such services are enormous. They include new types of consumer products and services, new competition to existing providers of telephony, and new opportunities, domestically and globally, for U.S. industry.

Before we can move forward with the important decisions involving these new services, however, we must put to rest the remaining relocation issues still pending in this proceeding. I hope that we can do so quickly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 73,	**FO Docket 91-301**
Subpart G, of the Commission's	**FO Docket 91-171**
Rules Regarding the	
Emergency Broadcast System	

NOTICE OF PROPOSED RULE MAKING/
FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1992; Released: October 8, 1992

Comments Due: January 15, 1993
Reply Comments Due: February 16, 1993

By the Commission: Commissioner Duggan issuing a statement.

I. INTRODUCTION

1. This action continues our efforts to update and improve the Emergency Broadcast System (EBS), by consolidating the proceedings initiated in FO Docket 91-301 and FO Docket 91-171 into this *Notice of Proposed Rule Making/Further Notice of Proposed Rule Making* ("*NPRM/FNPRM*").[1]

2. By this *NPRM/FNPRM*, the Commission seeks comment on proposals to substantially modernize the current EBS structure and technical features. Based upon the comments we have received, we propose a new emergency alerting system ("System") to replace the current EBS. If adopted, the new System would provide an operational structure by which all System participants would work together on a voluntary, organized basis during emergency situations.

3. We further seek comments on a new generation of EBS equipment, herein referred to as the emergency alerting Device ("Device"), to replace and/or modify the current EBS alerting equipment. We believe consideration should be given to the use of such a Device to more efficiently disseminate timely emergency information to the public. The Device is proposed as a piece of equipment that specifies universal input and output parameters that would serve as the link in the programming chain allowing a broadcast station or cable system to disseminate emergency information.

4. While we believe that these proposals reflect a balance between the need for modernizing EBS and nationwide uniformity, we stress that these proposals are by no means final or exclusive of all alternatives. Interested parties as well as the public are thus encouraged to submit additional proposals and recommendations, including ways in which the benefits as well as costs of EBS changes might be more accurately assessed.

II. BACKGROUND

5. In 1951, President Harry S. Truman established CONELRAD (Control of Electromagnetic Radiation), which required stations to broadcast on 640 or 1240 kHz during an emergency alert to the public and other downstream stations. Although it had several functions, it was established primarily for national security. By the early 1960's the development of missile guidance systems made the CONELRAD system obsolete. President John F. Kennedy, however, still wanted the capacity to reach the public on short notice, so he established EBS. EBS allowed stations to transmit on their normal frequencies during an emergency, but retained the old CONELRAD alerting technique.

6. The technical characteristics and the structure of EBS were last revised in 1975. At that time, the alerting system was replaced and EBS was permitted to be used as an early warning system for state and local emergencies.[2] While the system has never been activated on a national level, it has been activated more than 14,000 times on the local and state levels for emergencies.

7. The present EBS utilizes radio, television and cable television networks; wire services; and common carrier facilities. Over 12,500 individual broadcast stations and a number of local cable system facilities and personnel participate on a voluntary, organized basis.

8. Since the inception of EBS, the technical and operational parameters of the telecommunications industries have expanded. Technologies such as broadband cable, fiber optics, microwave and satellite network feeds are more widely utilized. The number of stations using some automation has also increased. The majority of the EBS equipment which has been in use since 1976, however, cannot accommodate major technical advances in these industries. Therefore, we believe it is prudent to consider modernizing the EBS.

9. On June 13, 1991, we adopted a *Notice of Inquiry* (NOI) in FO Docket 91-171 to solicit comments on new technology applications and equipment that could best improve the EBS.[3] On October 9, 1991, we adopted an *NOI/Notice of Proposed Rule Making* (NPRM) FO Docket 91-301.[4] In the *NOI* section of Docket 91-301, the Commission solicited comments on revising the EBS test script and allowing the activation, monitoring, and full control of the EBS network by remote control. In the *NPRM* section of

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[1] *See Notice of Inquiry*, 6 FCC Rcd 4264 (1991); *Notice of Inquiry/Notice of Proposed Rule Making*, 6 FCC Rcd 6739 (1991).

[2] These changes included the current 20-25 second two-tone signal, and an agreement between the FCC, the Federal Emergency Management Agency (FEMA), and the National Oceanic and Atmospheric Administration (NOAA) to share responsibility for developing the use of EBS at the state and local levels.

[3] *See Notice of Inquiry*, FO Docket 91-171, 6 FCC Rcd 4264, June 26, 1991.

[4] *See Notice of Inquiry/Notice of Proposed Rule Making*, FO Docket 91-301, 6 FCC Rcd 6739, November 8, 1991. *See also Petition for Rule Making* (RM-7188), filed by the National Association of Broadcasters (NAB).

Docket 91-301, the Commission sought comments on shortening the EBS two-tone transmission time and prohibiting the false use of the attention signal.[5]

10. The Commission received 14 comments and 3 reply comments on Docket 91-301 and 58 comments and 7 reply comments on Docket 91-171. Because of the overlapping technical and operational issues raised in both items, the Commission saw many of the same concerns, such as a need to update the EBS equipment, raised in both dockets. Additionally, the majority of commentors indicated significant support for combining the two Dockets. The Commission believes that the public interest is best served by consolidating the two proceedings into this *NPRM/FNPRM*.

11. Based upon the comments we have received in these proceedings, we believe that EBS equipment should be capable of interacting with all technologies. The saving of lives and property is of paramount concern to the Commission. The Society of Cable Television Engineers (SCTE) best summarized the viewpoint of numerous commentors regarding the importance of modernizing EBS equipment when they said, "In order for the new ...system to be truly effective and have ubiquitous coverage...[EBS] should include all technologies."

12. Moreover, many commentors suggested that there is a need to improve the current EBS operational aspects by replacing it with a mandatory intelligible and functional system.[6] The Society of Broadcast Engineers (SBE) found that some of our current guidelines were "unnecessarily complex." SCTE recommended, as did other commentors, that perhaps the best way to heighten attention to improving the EBS was to rename it.[7]

13. This *NPRM/FNPRM* sets forth, and seeks comment on, our proposal for improving the current EBS operational framework by creating a new System to replace EBS. We also solicit comments on our proposal to modernize the current EBS equipment with more reliable and efficient technology by creating a new Device. We believe that by overhauling the operational and technical features of the current EBS, we will be able to more effectively take into consideration both industry and public safety issues.

III. DISCUSSION

General

14. In Docket 91-171 we sought information on technological applications to reduce the net burden on licensees, consistent with our objective of ensuring reliable service to the public and meeting our statutory mandates with regard to national defense and to saving lives and property. A substantial number of these matters were also addressed by commentors and reply commentors in Docket 91-301. By combining both Dockets into this *NPRM/FNPRM*, we now focus on these responses and set forth for comments our proposals regarding the following issues: technical improvements such as new alerting equipment; a new operational and technical structure for the system; including cable as an EBS participant; automatic alerting systems; levels of automation; remote control devices; shortening of the two-tone transmission time; end of message codes; modifications to the test script; prohibition of false and deceptive EBS attention signal; and other related concerns.

15. We have encouraged the efforts of states to explore or implement evolutionary technical changes to improve EBS performance during emergency situations. As a result, several states such as Colorado, Missouri, New Jersey, New York and South Carolina are undertaking extensive testing or enhancing their emergency alerting equipment to improve communications during emergencies using broadcast, cable, and satellite technologies. The cable industry, and more specifically, SCTE, has established an EBS working group for that purpose. They are in the process of promoting the importance of active EBS participation with other industries in saving lives and property. SCTE is also reviewing existing or off-the-shelf equipment that will allow cable systems to participate in the EBS program in a timely and cost effective manner. Additionally, SCTE is seeking new equipment designs that would enhance their capabilities to better serve cable viewers during an emergency.[8]

16. We are aware that this important testing by SCTE, states, and other entities is costly, as well as time consuming. The Commission anticipates that these test results will lead to the development of EBS delivery equipment that will best reflect the technological changes germane to an emergency alerting system and which may be used throughout the telecommunications industry. Through this *NPRM/FNPRM*, we are inviting comments on our proposals that will be evaluated in conjunction with the various test results.[9]

Automatic Alerting Systems

17. In Docket 91-171, we suggested that the present EBS could be improved through the use of an automatic alerting system. In that *NOI*, we discussed four automated systems, which included: WRSAME, SAGE/RDS, ICEBS

[5] Specifically, we proposed to amend the EBS Rules and Regulations to reduce the length of the EBS two-tone attention signal to a minimum of eight seconds and a maximum of 25 seconds. The amendment further proposed to reduce the time delay decode incorporated in the EBS activation or demuting process to a minimum of three seconds and a maximum of four seconds of tone reception. Additionally, on our own motion, we proposed to prohibit the transmission of the EBS attention signal tone, any recording of the attention signal, or any other simulation of the attention signal in any circumstance other than in an actual national, state, or local emergency or for the purpose of an authorized test of the system.

[6] Most of the commentors were supportive of the mandatory nature of the 1975 implementation of the present two-tone, and suggested that the Commission take a similar approach in the development of an improved EBS.

[7] Although the previous dockets did not discuss renaming EBS, the SCTE working group draft comments best typified the other commentors recommending renaming EBS: "Given that this new system for alerting the public of emergency situations will go well beyond merely broadcasting...we feel that a change in the name...is in order. This also would help the public [and industry participants] to understand that there is a new technological advanced system replacing the current...system which has come to have a negative image.

[8] Currently, a cable television viewer cannot receive an EBS activation notification during an emergency unless that cable system is tied into EBS, or the channel that the viewer is watching is a local television station or national cable program supplier delivering an EBS message.

[9] *See Public Notice* 14286, issued on August 6, 1991, which permitted test proposal or studies to be submitted after the

and EDIS.[10] There was no consensus from the commentors, however, regarding the adoption of one particular system.[11] Rather, commentors who supported the adoption of a particular system based their preference on environmental conditions of their area, or their ability to afford new equipment.

18. Those commentors in favor of a generic automation system felt that they would no longer have to monitor the EBS as carefully, and would thus be able to free their operators to do other station-oriented activities. Those who opposed automation felt that a new system would take control from operators without their prior consent.

19. Rather than adopting one of the four above alerting systems, at this time we propose a new Device that would accommodate the concerns raised in the record of these EBS proceedings.[12] We believe that while the record shows that none of the proposed systems, in isolation, could sufficiently achieve our goal of a compatible national alerting system, the proposed new Device can bridge the old EBS alerting equipment to the new generation of emergency alerting systems. However, little specific information was provided to accurately determine what incremental gains might be achieved through particular changes and expenditures. Therefore, we invite comments on the degree to which our proposals to modernize the EBS equipment should be adopted.

Levels of Automation

20. The present EBS requires stations to monitor the two-tone signal, which alerts operators that an emergency or test is in effect. When an actual emergency triggers the EBS, operators must use their discretion to determine whether such an emergency warrants a break in normal programming.

21. Stations are required by the Communications Act to have an operator on duty when the station is on the air. Although the operator may have EBS as one duty, this task can be performed by other station personnel. Commentors from smaller stations pointed out that in fact, their personnel performed many tasks in addition to monitoring the EBS. These personnel may be away from the monitor and unable to respond to the alerting signal in a timely manner. In addition, some commentors believed that the present system puts too much control into the hands of operators who are insufficiently trained to respond to an alerting signal.

22. In Docket 91-171, we discussed differing levels of automation. We stated that Type I automation could be fully automatic. Thus, if the data received from the originating source was properly coded, the alerting system would automatically override the regular programming, and provide emergency information to the public.[13] Type II automation, otherwise known as "veto override," would allow the operator a short period of time in which to deactivate the system. If the operator determined that the station was not in an affected area or if the type of emergency was not severe enough to warrant a preemption, the operator could disarm the system to allow normal programming to continue. If the operator decided that programming should be disrupted, the operator would do nothing and the alerting system would automatically take over after several seconds. The system could also preempt normal programming if there were no operator at the monitoring system at the time the system was triggered.[14] Type III automation would require the acknowledgement of the operator before interruption of normal programming.

23. Through this *NPRM/FNPRM*, we propose to allow stations and cable systems to select their level of automation by designating the types of emergencies they want to transmit.[15] We propose that there be a standardized time interval of five seconds between the transmission of the initial attention signal to the operator and the retransmission of the attention signal to the public for those stations/cable systems selecting the message delay option.[16] We seek comments on our automation proposals. 24. We further propose that Type III automation continue to be an option for most EBS participants. However, because of the vital link in providing downstream stations with emergency information, we propose that operator monitoring remain mandatory for Common Program Control Station - One (CPCS-1)'s, CPCS-2's, Primary Entry Point (PEP), Originating Primary Relay (OPRELAY), and RELAY stations.[17] This is because these stations provide the first level of emergency warning to their regions, states, and communities. However, because we realize that automation can

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closing date of Docket 91-171. The results of these tests will submitted to the Commission by December 30, 1992. Interested parties will have opportunity to discuss the results in their comments.

[10] *See Notice of Inquiry*, Docket 91-171, 6 FCC Rcd 4264. WRSAME is the National Weather Service's system that utilizes audio band technology and appends normal weather programming with digital signalling information; SAGE's RDS uses a non-audio band FM subcarrier to identify the type of emergency and selectively activate receivers; ICEBS is an audio band system that can specify the type and location of an emergency through the use of a modified Dual Tone Multi Frequency (DTMF) system; EDIS is a packet radio system that transmits state and local emergencies through the use of non broadcast frequencies. *See also infra* footnotes 27-29.

[11] The number of commentors supporting each automated systems were: WRSAME (6); ICEBS (3); SAGE (14); a combination of WRSAME and ICEBS (4); a combination of ICEBS and EDIS (1); and other systems (3). These numbers do not reflect the views of those commentors who did not support a specific system, nor do they reflect those commentors who expressed their opposition to particular systems.

[12] *See* paragraphs 42 - 53 *infra*.

[13] This level of automation would allow the participants to pre-program the equipment to respond to certain types of emergencies, in certain areas, at certain levels of severity.

[14] In general, there is support from commentors for the override feature. This would provide a means for the operators to "double-check" that the system will be interrupting normal programming only during pre-determined types of emergencies. It also would ensure that the public would receive timely emergency information without having to completely rely on human intervention.

[15] *See* 47 C.F.R. § 73.935 (a). Within this Section, station management is provided with examples of emergency situations for which EBS may be activated such as severe weather, widespread power failures and industrial explosions. Other localized emergencies also could be appropriate for EBS activation, *e.g.*, a local or regional telephone network outage or similar disruption in public communications.

[16] *See* paragraph 64.c. *infra*.

[17] *See* 47 C.F.R. § 73.914-917.

significantly reduce the transmission time of an emergency alert, we propose to permit these special classes of stations to automatically retransmit limited, area specific, emergency information as detailed in their state and local EBS plans.[18] We believe that this limited automated capacity would assist our goal of promoting maximum safety to the public. We seek comments on operator monitoring requirements for these special classes of stations.

Remote Control

25. At the present time, while broadcasters are permitted to use off-premises remote control systems to activate the EBS, they are required to have EBS monitoring and control equipment at the location of the remote control.[19] The Commission recognizes that such a requirement may prove impractical for newer technologies. For example, cable television systems do not always have a full-time duty operator to monitor and activate the EBS. Additionally, since daytime radio stations, smaller radio stations, and some smaller television stations are not on the air 24 hours a day, these operations are adopting more automated systems that have little need for full-time operators.

26. Thus, to encourage greater participation in the System, we propose requiring use of a new Device which would allow an option for complete access via remote control. By incorporating remote control capabilities into such a Device, a more convenient alternative will be made available to stations and cable system operators. In addition, the human error factor would be significantly reduced. If Type II or Type III automation is used, remote control would allow the activation responsibility to be reassigned to someone other than an operator.[20]

Shortening the Two-tone Transmission Time

27. The Commission's Rules and Regulations require all licensed broadcast stations to install and maintain equipment that is capable of receiving and transmitting the EBS alerting signal. Such equipment allows broadcasters to notify the public of a pending or actual emergency situation in the area that the station serves.

28. The present EBS uses an attention signal that combines two-tones at 853 and 960 Hz. This two-tone alerting signal is used to draw the attention of the audiences and operators to the EBS in order to signify a test or actual emergency. EBS Rules and Regulations require a signal duration of between 20 and 25 seconds and a decoding time of between eight and 16 seconds. This allows four to 17 seconds for the audience to hear the tone and to identify that a test or emergency is in progress.

29. In the *NPRM* section of Docket 91-301, we discussed the possible shortening of the two-tone signal to a minimum of eight seconds, while retaining the 25 second maximum. We also discussed the adoption of a three to four second time delay. The NAB *Petition* requested that the Commission modify the two-tone signal because they felt that audiences were being desensitized by the lengthy signal, which resulted in a "tune out" factor.

30. There was general agreement among the commentors in Docket 91-301 that the two-tone signaling needed to be replaced or modified. However, commentors disagreed as to whether the tone should be shortened or whether it should be replaced with a different tone.

31. We propose not to reduce or replace the two-tone signal at this *NPRM/FNPRM* stage. We believe that our action is justified in order to reduce the burden on the industry that would result during the transition from the current EBS system to the new proposed System that utilizes the Device proposed herein. A reduction in the two-tone signal now would create confusion in the industry due to the need for allowing variable transmission times during this conversion phase.[21] In addition, EBS equipment would have to be taken off line during this transition, which could cause some stations to miss real emergency information. Similarly, we believe that it would be impractical to ask EBS participants to modify their current equipment to allow for a shortened two-tone signal,[22] because further modifications might later be necessary if the EBS converts to the proposed new Device.

End of Message Code

32. The commenters did not adequately address whether we should incorporate an end of message code into the EBS at this time. We continue to believe that such an approach has merit and would be of no additional cost in the proposed Device. Therefore, we propose an end of message code that would be able to return participants to their regular programming.

Test Script

33. In order to train station operators and to verify that the system is functioning, stations conduct EBS tests on a weekly basis. During this time, broadcasters are required to transmit the two-tone signal and read a standardized test script to inform the public that an EBS test is in progress.

34. The Commission believes it is important to have basic test script requirements to ensure that there is some continuity for the public and for EBS participants. In 1971, 1981, and 1986, the test script was amended to allow

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[18] Certain stations in severe weather corridors or with particular environmental conditions would be permitted to bypass the operator with direct input from their Device. They must, however, comply with the provisions of revised State Emergency Broadcast System Operation Plan. 47 C.F.R. § 73.922.

[19] *See* 47 C.F.R. § 73.932. The basis of this requirement is to ensure that any and all activations are responded to by station/cable system personnel, and that those participants who choose to use a remote control device have the opportunity to receive all pertinent emergency information before activating the system via remote control.

[20] An automated system does not negate the need for remote control capabilities. Although Type I automation is fully automated and does not require operator involvement, Type II and Type III automation do necessitate some level of human intervention. Therefore, if Type II or Type III automation is implemented, remote control could still be used to activate the system.

[21] *See* paragraph 56 *infra*.

[22] Such modifications would require every station to pay approximately $50 to modify existing decoders, plus a re-certification fee to the FCC lab. Modifying existing encoders would cost approximately $200, as well as payment of a fee to the FCC lab for type acceptance. All the equipment would have new FCC identification numbers.

stations to identify their call sign, city of license, operational area, and the types of emergencies likely to occur in their area.

35. The current test script reads as follows:

> "This is a test. This station (optional--insert station call sign) is conducting a test of the Emergency Broadcast System. This is only a test...This is a test of the Emergency Broadcast System. The broadcasters of your area in voluntary cooperation with Federal, State and local authorities have developed this system to keep you informed in the event of an emergency. If this had been an actual emergency, (optional--may mention the types of emergencies likely to occur in their area) the Attention Signal you just heard would have been followed by official information, news or instructions. This station (optional--insert station call sign) serves the (operational area name) area. This concludes this test of the Emergency Broadcast System."

36. The issue of a modified test script was raised in the *Petition* submitted by the NAB. According to the NAB, each operational area throughout the country has unique uses for the EBS. Therefore, the NAB requested that every participant be able to tailor the test script to reflect their individual needs. Within Docket 91-301, we addressed these particular concerns.

37. In reviewing the comments, there were no strong opinions raised to alter the present test script.[23] Those few commentors in favor of permitting changes in the test script suggested that such modifications would allow participants to supply their audiences with useful, community-oriented information to further prepare the public for actual emergencies. Commentors against allowing modifications suggested that audiences might be confused by any variations in the test script.

38. We seek comments on whether we shouldminimally revise the EBS test script to reflect the involvement of new participants. The EBS Rules and Regulations currently state that "activation of the EBS at the state and local level by a broadcast station [cable system] or coordinated test of EBS operational procedures for an entire state or Operational (Local) Area may be conducted in lieu of the Weekly Transmission Tests of the Attention Signal and Test Script." Coordinated tests can use scripts authored by the stations and officials and even include live messages from officials. The intent is to use the same facilities and personnel as would be used in an actual emergency. Several states and EBS areas have conducted coordinated tests using live messages. The Commission has received reports on some of these tests, some very successful, others less successful. Coordinated tests are an option for stations to exercise their state and area EBS under conditions unique to their part of the country.[24]

Prohibition of False and Deceptive EBS Attention Signal

39. In the *NPRM* section of Docket 91-301, we discussed amending the Commission's Rules and Regulations to prohibit the false and deceptive use of the EBS attention signal. Although such misconduct is prohibited by Section 325(a) of the Communications Act, and the recent Broadcast Hoax amendment to the Commission's Rules and Regulations,[25] we believe that an amendment to the EBS Rules and Regulations is necessary to ensure the integrity of the system.

40. The commentors who addressed this section of the Docket agreed with the Commission that any use of the EBS attention signal, other than for tests and activations, could be an enormous detriment to the system.[26]

41. Therefore, by this *NPRM/FNPRM*, we propose to add Section 73.944, to prohibit false use of the EBS two-tone attention signal or any of the new special codes.[27] Such misconduct would be considered a False Distress Communication and would be subject to Commission penalties, such as monetary forfeiture or other appropriate sanctions.

National Framework for the New Device

42. The overwhelming majority of commentors and reply commentors to the *NOI* in Docket 91-171 and to the *NOI/NPRM* in Docket 91-301 focused their comments on suggestions for replacing or supplementing the existing EBS equipment. Given the age of most EBS equipment in the field, the increased use of newer technologies such as cable, and the increased numbers of EBS activations, we agree with those commentors who proposed that now is the time to overhaul EBS and create a new generation of emergency alerting equipment to better serve the public.

43. Taking into consideration these arguments, we propose, through this *NPRM/FNPRM*, to modernize the EBS equipment. With automation, new technology, personnel turnover at broadcast and cable facilities, and a decline in the number of EBS equipment manufacturers, a more efficient scheme for EBS should be put into place. However, we seek comments on the best manner to achieve that goal. Many commentors pointed out shortcomings in the ability of the present system to function in the event of a national emergency. They noted the prevalence of cable in the home and the need for the EBS to be inclusive of this technology. Since current cable home penetration has risen to over 60%, and many cable systems are automated, we propose that our new Device be expanded to enable the cable industry to be a full participating partner in EBS.

44. We believe it would best serve the public interest to create a new Device -- one for AM TV, one for FM, and one for cable -- to replace current EBS alerting equipment. For the new System to hold national, state or operational area tests or activations and for the equipment to function properly, it is important that all stations and cable systems have this compatible alerting equipment. We recognize, however, that there may be other alternative approaches which might also be adopted, such as not replacing the

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[23] Of those commentors addressing the test script issue, five were opposed to changing the script, and three were in favor of modifications.

[24] *See* 47 C.F.R. § 73.961(d). The need for greater modifications to the test script is removed because if a station participates in the new required monthly test within the state or operational area, it already has a venue to alter the test script.

[25] *See* 47 C.F.R. § 73.1217.

[26] Of those commentors who addressed this issue, six were in favor of an amendment to the Commission's Rules and Regulations, and only one was opposed.

[27] *See* Appedix F.

current equipment or just shortening the two-tone. Thus while we are proposing to create this new equipment, we will continue to thoroughly review all tests, proposals and responses to this *NPRM/FNPRM* in order to fully evaluate the parameters for any final emergency alerting device ultimately adopted by the Commission. The findings, where appropriate, will also be reflected in the development of the new Device.

45. We believe that any Device should have certain capabilities to allow it to interface with broadcast stations, cable systems, emerging technologies, and other government systems. In addition, system-wide use of the same equipment is likely to reduce the cost of equipment; decrease the likelihood of system failures; and increase universal operator training, thus reducing human error. At the same time, we believe it is equally important to allow stations and cable systems to determine these parameters and therefore further propose that the equipment be flexible enough to allow for specialized emergency alerting needs. We solicit comments on the best means for achieving these goals.

The Emergency Alerting Device

46. Many of the commentors suggested that in order to create a viable EBS network to meet the needs of the country, we should consider modernizing the current EBS equipment. Cost was a factor raised by some commentors, and we are sensitive to that issue. We invite comment on what might be the price of the new equipment and on alternatives for modernizing the current equipment. Nonetheless, many commentors pointed out that they favored investing in new equipment rather than continuing to repair and replace the existing equipment.

47. It is estimated that the costs of installing and operating the new equipment for the broadcast and cable industries would range from $50 million to $60 million. The benefit of such new equipment, however, would be in lives saved and property losses lessened or avoided. While no precise estimates of avoidable or ameliorated property losses have yet been developed, two facts are clear. First, good emergency warning systems can be quite effective in terms of reducing or avoiding property losses and, second, effectiveness and timeliness are clearly linked. In other words, even a relatively small reduction in the time it takes to disseminate an emergency message can be reasonably expected to yield a disproportionately large public interest gain.

48. The value of the new equipment is that it can disseminate emergency information by simultaneously capturing, automatically, 100% of the broadcast stations and local cable companies' channels in a market. There is some sense that a sector of the manufacturing industry can produce the alerting equipment and also produce receivers with the "turn-on" feature in their next generation of equipment.[28] We seek comments on the value of an emergency sensor that activates the receiver and information from any manufacturers who either currently or in the future plan to produce them.

49. To further the goals of expediently and efficiently handling emergency notifications to the public, we propose new equipment configurations for comments (See Appendix G). The equipment that we have tentatively designed herein would allow station/cable personnel to select special codes toautomatically interrupt programming for specific types and levels of emergencies affecting certain areas and have other modernized features to more effectively deliver timely emergency alerting information to the public. We seek comments on these proposed Devices listed below, recognizing that there may be other alternatives which we encourage commentors to raise.

50. First, we propose an *AM or TV station* Device. We generally see it designed to be able, upon detecting the WRSAME[29] codes from another broadcast station or NOAA Weather Radio, or the RDS[30] codes from an FM station, to automatically interrupt normal programming for those emergencies (such as tornadoes in the tornado corridor) selected by station personnel. It would broadcast the codes, with the shortened EBS two-tone signal, the EBS message and the end of message codes (see Appendix G, Figure 1a).

51. Second, we propose an *FM* station Device. We generally see it designed to be able, upon detecting the codes via the same methods as the above stations, to automatically interrupt normal programming for those emergencies selected by station personnel, broadcast either the WRSAME codes on their FM signal or the RDS codes on their FM subcarrier, with the shortened EBS two-tone signal, the EBS message and the end of message codes (see Figure 1b). RDS encoding equipment would be optional for all FM stations except those having key EBS designations such as PEP; CPCS-1, 2, and 3; OPRELAY; and RELAY stations.[31]

52. Third, we propose a *cable system* Device. We generally see it designed to be able, upon detecting the codes via the same methods as the above stations, to automatically interrupt audio programming on all non-broadcast channels (video interruption is optional) for those emergencies selected by cable company personnel, and transmitting the shortened EBS two-tone signal and the EBS message (see Figure 1c). Additionally, this Device will monitor for DTMF signals from a telephone (touch tone) input. The SCTE EBS working group in their draft technical report felt that DTMF decoding should be incorporated because thousands of installations currently deployed in cable communities are activated by local

[28] Such a device, EDIS, was discussed in Docket 91-171. Another device of which we are aware from the comments is SAM (Safety Alert Monitor). This device complements cable systems by providing a receiver box in the home of the consumer. We were also informed through the comments that Delco is working on such a device that would become a part of car radios.

[29] WRSAME (Weather Radio Specific Area Message Encoder) is a device connected to a standard National Oceanic and Atmospheric Administration (NOAA) Weather Radio program console that puts a special code at the beginning and end of selected messages broadcast over weather radio. The code is almost identical to the heading used on all National Weather Service (NWS) messages and the Universal Geographic Code (UGC) used on most watches, warnings, statements and some forecasts.

[30] RDS (Radio Data System) is the commonly referred to name of the United States Radio Broadcast Data System (RBDS) standard. It was produced by the RBDS subgroup of the National Radio Systems Committee (NRSC), sponsored by the Electronic Industry Association (EIA), and the National Association of Broadcasters (NAB). The voluntary standard reflects the input from broadcasters, receiver manufacturers, users and potential users of RDS services.

[31] *See* Definitions section of the EBS Rules and Regulations.

authorities using DTMF via touch-tone telephones, and that some state and regional planning efforts use DTMF signals such as Colorado ICEBS.

53. Transmission methods on the cable system are being examined by the SCTE working group, whose results will be incorporated into this proceeding for the determination of parameters for the cable Device, where appropriate. However, we are cognizant of the recent dramatic changes in cable television systems design and configurations, and thus also seek additional suggestions on other detection and transmission methods which may improve upon our proposal.

Universal Parameters

54. We are proposing universal parameters that would be required for all Devices, so that all AM, FM and TV broadcast stations and cable systems would have compatible equipment. We seek comments on our proposed parameters and which should be mandatory or reduced to optional status.

a. Basic Parameter Criteria.

(1) Reduce emergency warning time to the public by directly turning on and off radios and televisions (if permission is given by the owner or the receiver is installed with proper circuitry) in the home and office.

(2) Reduce dependency on human intervention at station and cable television facilities.

(3) Require multiple monitoring to reduce dependence on one station.

(4) Allow personnel to program their Device to automatically interrupt their programming for specific types and levels of emergencies affecting certain areas.

(5) Continue use of the current two-tone signal; phase out old equipment; and phase in a new Device.

(6) Phase out two-tone decoding as an interstation signalling technique; and maintain shortened two-tone encoding as an alerting signal.

(7) Require interoperability with local cable systems, new NOAA National Weather Service (NWS) systems and Remote Pickup Unit (RPU) equipment.[32]

(8) Ensure proper operation through a self-testing capability of the Device.

(9) Ensure system readiness with built-in silent testing capability, but require on-air tests.

(10) Require contact closure to activate other equipment.

55. To assist in the development of the proposed parameters, we also examined the potential implementation scheme of how to phase in the requirements. We invite comments on both the universal parameters and the following implementation phase.

56. The majority of commentors in Docket 91-301 supported reducing the transmission time of the EBS two-tone attention signal. We seek comments on our proposalto change the EBS Rules and Regulations so that the Device complies with (1) Section 73.940 (Encoder devices) with the exception of paragraph (d) which concerns the transmission time that will now be for a period of not less than 8 seconds nor longer than 25 seconds, and (2) Section 73.941 (Decoder devices) with the exception of (paragraph (a)(1) which concerns the time delay that will now be a minimum of three seconds but not more than four seconds of tone reception. Because there will need to be a period of time for all existing decoders to be modified, we seek comment on whether permitting the existing transmission times under paragraph (d), "20 seconds nor longer than 25 seconds," to remain in effect until January 1, 1994, would allow sufficient time for a reasonable transition. After that date, stations can elect to shorten the transmission time to 8 seconds.[33]

57. Similarly, we seek comment on whether beginning on July 1, 1994, all AM, FM and television stations, regardless of output power, and cable systems[34] should be required to install and operate the proposed mandatory Device during their hours of operation. We propose herein to permit those using existing equipment to convert to the new Device, during the period from July 1, 1993 to July 1, 1994. New participants, however, would be expected to comply immediately, assuming the equipment is available. We seek comment upon whether manufacturers would be able to make the new equipment to accommodate this transition timeframe. We further seek comments on other technologies such as MMDS and SMATV being included in the new System.

58. In order to significantly enhance the reliability of the EBS, and to reduce the effect of daisy chain monitoring,[35] we seek comments on changingthe Commission's Rules and Regulations so that the Device complies with an amended Section 73.932(a) (Monitoring Requirement). The new Device would allow for multiple inputs, thus reducing the dependency on any one station. By example, we propose that the amended Section require that the equipment be capable of receiving the shortened attention signal, the special codes listed below and emergency programming from two different broadcast stations. One station would be an AM station and the other an FM station. The equipment would be capable of receiving and decoding AM and FM signals with the Weather Radio Specific Area Message Encoder (WRSAME) codes, and the FM subcarrier signal with the Radio Data System (RDS) standard. Cable systems

[32] Frequencies may be allocated by the FCC on an exclusive basis for EBS nationwide.

[33] It is important to note that there are hundreds of EBS decoder/receivers located in businesses and homes in the tornado belt and near nuclear power plants that rely on the 20 to 25 second transmission time to operate properly. Stations responsible for activating those units should continue to transmit the longer two-tone signal.

[34] *See* 47 C.F.R. § 76.5.

[35] Daisy-chain monitoring refers to the key stations relaying EBS messages with the two-tone signal from one station to another station. Broadcast commentors raised the concern that the present daisy chain network was often unreliable. Many stations are completely dependent on the CPCS-1 in their EBS Operational Area. If the CPCS-1 fails to or decides not to activate the system, the secondary stations are not given the opportunity to inform their audiences. Thus as one commentor put it, a chain is only as strong as its weakest link. Moreover, in the present EBS configuration, cable is not a part of the link.

would also have the capability of decoding DTMF codes. We have proposed this Device configuration based on the analysis of comments and draft reports from the working groups. We invite comments on this configuration to reduce dependency on daisy chain monitoring.

59. The Commission is in the process of examining requests from industry to allocate two or more frequencies for exclusive use of EBS across the United States.[36] These VHF and/or UHF frequencies could provide an invaluable communications capability for off-air testing and distribution of emergency information. Based on the above, we believe that the Device should be capable of receiving any selected frequencies, and seek comment on the feasibility of such a requirement.

60. We seek comments on amending Section 73.940 to require that the Device modulate AM, FM and television signals with the WRSAME codes and, if used, modulate an FM subcarrier signal with the RDS standard, including end of message codes. WRSAME AM modulation levels equal to programming levels (50% to 100%) are acceptable. Working groups have initially indicated that these levels of modulation are sufficient to decode WRSAME receivers. However, we emphasize that these suggestions are primarily advanced to serve as catalysts for further discussions and proposals. We are not locked into this configuration but seek information on the feasibility of such proposals.

61. We propose that any adopted Device should have a self-test capability to ensure that all encoders and decoders are functioning properly and that there is RF carrier present at the appropriate inputs. We are further proposing that the Device should have visual displays which indicate operational readiness.

62. We seek comments on the Device being compatible with character generators/computers, especially at television stations and cable locations[37] A digital output would be included to feed through ASCII text to be used for a video crawl for television stations and cable systems.

63. These parameters have been provided as a focus for further information gathering. We seek comment upon the feasibility and necessity for the universal parameter requirements proposed herein. In addition, we invite commentors to submit any suggested additions or substitutions, and the reasons therefore.

Optional Parameters

64. We seek comments on enhancement features, proposed herein, that would be further options for stations/cable systems to incorporate into their emergency alerting equipment. The proposed additions include, but are not limited to the following:

a. Automatic recording and/or paper printout of all EBS test and emergency messages. This parameter will ease EBS logging requirements.[38]

b. Tunable AM and FM receiver to allow for changes in EBS monitoring assignments.

c. Message delay option of five seconds to allow time for station/cable system operators to decide whether they want to override any emergency messages. This override capability would not apply to WRSAME or RDS codes used for national level EBS emergency messages.

d. Automatic dialing/paging system to initiate telephone calls to station/cable system personnel in the event of an alert.

e. Data port (such as RS232) for receiving digitized signals.

65. We seek comment on the optional parameters proposed herein. In addition, we invite commentors to submit any suggested additions or substitutions, and the reasons therefore.

Device Testing

66. Many of the commentors were concerned that the current running of weekly on-air EBS tests was causing a "tune-out" factor to occur among their listeners and thus placing them in jeopardy in the event of an actual emergency activation of EBS. Based on our assessment of the record, we will continue to allow all stations/cable systems to conduct on-air weekly tests. We propose to allow all stations/cable systems if they wish to, reduce their on-air EBS testing by permitting silent testing three weeks of a month at any time determined by station/cable management.

67. We propose that the shortened EBS two-tone attention signal (or the optional longer 20 second version) would only be transmitted for actual emergencies or the required once a month on-air EBS tests. A monthly test would be required if there is no EBS activation during a month. These tests could be conducted between the hours of 8:30 am local time and local sunset. The required monthly tests would be transmitted simultaneously by all stations/cable systems in an EBS Operational Area or State. We propose that Operational Area tests would be coordinated by the CPCS-1 and state tests would be coordinated by the OPRELAYs.[39]

68. We seek comments on our proposal to allow stations the option of silent weekly tests (Sunday through Saturday) with no interruption of regular programming that would be performed a minimum of once a week at random days and times. We propose that silent tests require the transmission of the WRSAME or RDS codes, but not the two-tone attention signal. In addition, audio/visual test script would not be required. We seek comments on the benefit and detriment of changing our testing requirements.

Other Related Issues

69. We propose through this *NPRM/FNPRM* that beginning July 1, 1995 (see Appendix H), the shortened two-tone signal would only be used as an audio alert signal and not as an interstation signalling technique. Therefore, all two-tone decoders could be disabled and the WRSAME and RDS codes would become the sole signalling tech-

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[36] *See* Sage Alerting Systems, Inc. Petition for Rule Making to Allocate Dedicated Frequencies for the EBS. Filed August 12, 1992 with the Secretary.

[37] *See* 47 C.F.R. § 73.1250(h), Broadcasting Emergency Information; 47 C.F.R. §76.606, regarding closed captioning.

[38] *See* 47 C.F.R. § 73.932, Radio Monitoring and Attention Signal Transmission Requirement; 47 C.F.R. § 73.961, Tests of the Emergency Broadcast System Procedures.

[39] *See* paragraph 33 - 38 *infra*.

nique. We seek comments on changing our signalling techniques and the proposed timeframe to implement the changes.

70. We propose through this *NPRM/FNPRM* that the Device automatically interrupt normal programming at all stations/cable systems for national emergencies. National level tests would be coordinated in advance.

71. We realize that the issue of coding has not been addressed in the *NPRM/FNPRM*. We seek comments on the importance of parallel coding for a portion of the coding sequence to allow for universal speed of altering and reduction of error in activation.

IV. ADDITIONAL CONCERNS

72. Several additional items were raised by a significant number of commentors in both Docket 91-301 and Docket 91-171. The merit of these discussions warrants serious consideration. We therefore seek further comments on the following issues:

(1) The merits and detriments of renaming of the Emergency Broadcast System to reflect the incorporation of other technologies and modernization of the structure of EBS. We have used a generic "System" for purposes of this agenda item.

(2) Allowing the use of Public Service Announcements to heighten awareness of EBS. Permitting commercial sponsorship of the EBS tests to foster goodwill between the stations and the businesses in their communities.

(3) Revitalizing the state and local EBS plans to include Amateur Radio participation and Emergency Management Systems.

(4) Including Wireless cable systems (MMDS), Direct Broadcast Satellite (DBS), Satellite Master Antenna Television Systems (SMATV), cellular, personal communications networks and other technologies in the new System.

V. CONCLUSION

73. Through this *NPRM/FNPRM*, the Commission puts out for comment, suggestions or alternatives, our proposals to modernize the current EBS operational structure with a new System. We also put out for comment our proposal for a new Device which would be modified by the tests mentioned earlier. We seek comments on whether the proposed new equipment should be a mandatory standard for universal use.

74. We further propose to revise the test script to reflect the new technologies participating in the EBS, and to provide pre-designated areas in the test script to allow participants to disseminate operational area specific information. We propose to delay shortening the two-tone until such time as the Device is approved. We believe this is justified because of the otherwise burdensome effect on industry. Finally, we propose a rule to prohibit the false and deceptive use of the two-tone attention signal and new special codes.

75. Parties should note that all proposals, set forth herein, are open to comments and changes. The final *Report and Order* adopted by the Commission will not necessarily conform to the proposals discussed in this *NPRM/FNPRM* but will be reflective of the entire record developed during this proceeding. Since this proceeding involves a major overhaul of our current EBS Rules, we are not proposing specific rule changes at this early stage. We intend to propose new rules at a later stage in a *Further Notice of Proposed Rule Making* proceeding.

VI. PROCEDURAL MATTERS

76. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 603, the Commission's initial analysis is as follows.

77. **Need and Objectives of this Action:** Technologies have dramatically improved since the last major modifications to the EBS. The EBS can be significantly improved by the adoption of new emergency alerting equipment. A revised test script is needed to reflect the new technologies participating in the EBS. A new operational structure to replace the current EBS, a new amendment deterring the unauthorized transmission of the EBS alerting signal, and new special codes are needed to ensure the safety of the public.

78. **Legal Basis:** This action is proposed in accordance with Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (o), and 303(r).

79. **Description, Potential Impact and Number of Small Entities Affected:** The proposed changes would modify the Commission's Rules and Regulations dealing with the Emergency Broadcast System. Approximately 12,500 AM, FM and TV broadcast stations; and 4-6 equipment manufacturers will be affected by the proposed rule making. This could affect 11,086 cable systems if they volunteer to participate in a new emergency alert system. New EBS encoders and decoders are projected to cost users about $3,000.

80. **Recording, Record Keeping and Other Compliance Requirements:** Stations would be required, as they presently are, to keep records of when encoders and decoders are taken out of service for any modifications adopted and when they are returned to operation.

81. **Federal Rules which Overlap, Duplicate or Conflict with this Rule:** None.

82. **Any Significant Alternatives Minimizing the Impact on Small Entities and Existing Licensees and Consistent with the State Objectives:** None.

83. Paperwork Reduction Act Statement. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling disclosure or record retention requirements and will not increase or decrease burden hours imposed on the public.

84. **Comment Provision.** Pursuant to the applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules and Regulations, interested parties may file comments on or before **January 15, 1993,** and reply comments on or before **February 16, 1993.** Parties submitting comments should include any statistical data or analyses and the methodology for arriving at their conclusions in their comments. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, Docket 91-171 and Docket 91-301, participants must file an original and six copies of all comments, reply comments,

and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

85. **Ex Parte Rules - Non-Restricted Proceeding.** This is a non-restricted notice and comment rule-making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

VI. ORDERING CLAUSE

86. ACCORDINGLY, IT IS PROPOSED, that pursuant to the provisions of Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), and 303(r), Part 73, Subpart G, of the Commission's Rules and Regulations BE AMENDED as set forth in the Appendix below.

87. IT IS FURTHER ORDERED, that pursuant to the provisions of Sections 1, 4(i) and (o), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (o), and 303(r), there is HEREBY INSTITUTED a *Notice of Proposed Rule Making/Further Notice of Proposed Rule Making* into the matters discussed above.

88. IT IS FURTHER ORDERED, that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

89. For further information on these proceedings, contact Helena Mitchell, FCC Field Operations Bureau, Room 720, 1919 M Street, N.W. 20554, (202) 632-3906.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

COMMENTS FOR 91-171

1) WTRW-AM
2) WPTR/WFLY
3) WCND-WCKP-WLBN-WLSK-WMSK
4) Dynatech Cable
5) WZZD
6) Jefferson County Emergency
7) New Hampshire Assoc. of Brdcters,
8) Nutmeg Broadcasting Company, WILI AM & FM
9) KMJM-FM
10) County of Lehigh Office of Emergency Management
11) Emergency Management Agency
12) Ellensburg Fire Department
13) Middlesex County Emergency Management
14) The HollyAnne Corp.
15) WTTV-TV and WTTK-TV
16) Office of Emergency Management -- Fort Worth, Texas
17) Alaska Chapter of the Society of Broadcast Engineers
18) EBS WACO Operational Area
19) National Preparedness Program Division
20) WHBC
21) Charles William Sepmeier
22) National Association of State Title III Program Officials
23) Multi-Technical Services
24) Titus Technological Laboratories
25) Lee Sutherland Parr
26) City of New Orleans Department of Utilities
27) State of Ohio, Emergency Management Agency
28) Family Stations
29) Community Alert Network
30) B.G. (Bob) Williams
31) New York State Emergency Communications Committee
32) Louisiana Emergency Preparedness Association
33) Deborah Wiener
34) TFT Inc.
35) Jack W. Coe
36) CCI
37) Counsel for the Community Broadcasters Association
38) Heimerl & Associates/SBE Tidewater Chapter 54
39) Broadcasting Partners of Dallas
40) Video International, Inc.
41) General Motors Research Corporation
42) South Carolina Budget and Control Board, Division of Information Resource Management
43) Society of Cable Television Engineers
44) Cue Network Corporation
45. Burk Technology, Inc.
46. Dynatech Cable Products Group
47) South Carolina Broadcasters Association

48) Capital Cities/ABC, Inc.
49) Jacor Communications, Inc.
50) National Association of Broadcasters
51) Kelly Broadcasting Company
52) State Emergency Communications Committee Colorado
53) Primary Entry Point Advisory Committee, Inc.
54) KOA Radio/Colorado State Emergency Communications Committee
55) National Weather Service
56) Society of Broadcast Engineers, Incorporated
57) SAGE Alerting Systems, Inc
58) San Diego, CA, EBS Committee

APPENDIX B

REPLY COMMENTS FOR 91-171

1) Texas SECC
2) Nutmeg Broadcast Company
3) Society of Cable Television Engineers
4) National Association of Broadcasters
5) Dynatech Cable Products Group
6) Cue Network Corporation
7) Capital Cities/ABC, Inc.
8) SAGE Alerting Systems, Inc.

APPENDIX C

INFORMAL COMMENTS FOR 91-171

1) Information Age System, Inc.
2) KMAM-KMOE
3) Western Nevada/Lake Tahoe Basin Operational Area
4) Information Age System, Inc.
5) KWKH
6) KHFM
7) Connecticut Broadcasters Association

APPENDIX D

COMMENTS FOR DOCKET 91-301

1. Wyoming Emergency Management Agency
2. TFT, Inc.
3. State of Ohio Adjutant General's Department, Emergency Management Agency,
4. Capital Cities/ABC, Inc.
5. Burk Technology, Inc.
6. Greater Media
7. National Association of Broadcasters
8. Cosmos Broadcasting Corporation
9. Charles William Sepmeier
10. Emergency Communications Committee -- Annapolis, Md.
11. Inland Operational Area EBS
12. New York State Emergency Communications Committee
13. Community Broadcasters Association

APPENDIX E

REPLY COMMENTS FOR 91-301

1. National Association of Broadcasters
2. Burk Technology, Inc.
3. North Carolina Emergency Communications Committee

APPENDIX F

Title 47 of the Code of Federal Regulations, Part 73, Subpart G, proposed to be amended as follows:

1. The authority citation for Part 73, Subpart G, continues to read as follows:

AUTHORITY: Sections 1, 4(i) and (o) and 303(r), Communications Act of 1934, as amended.

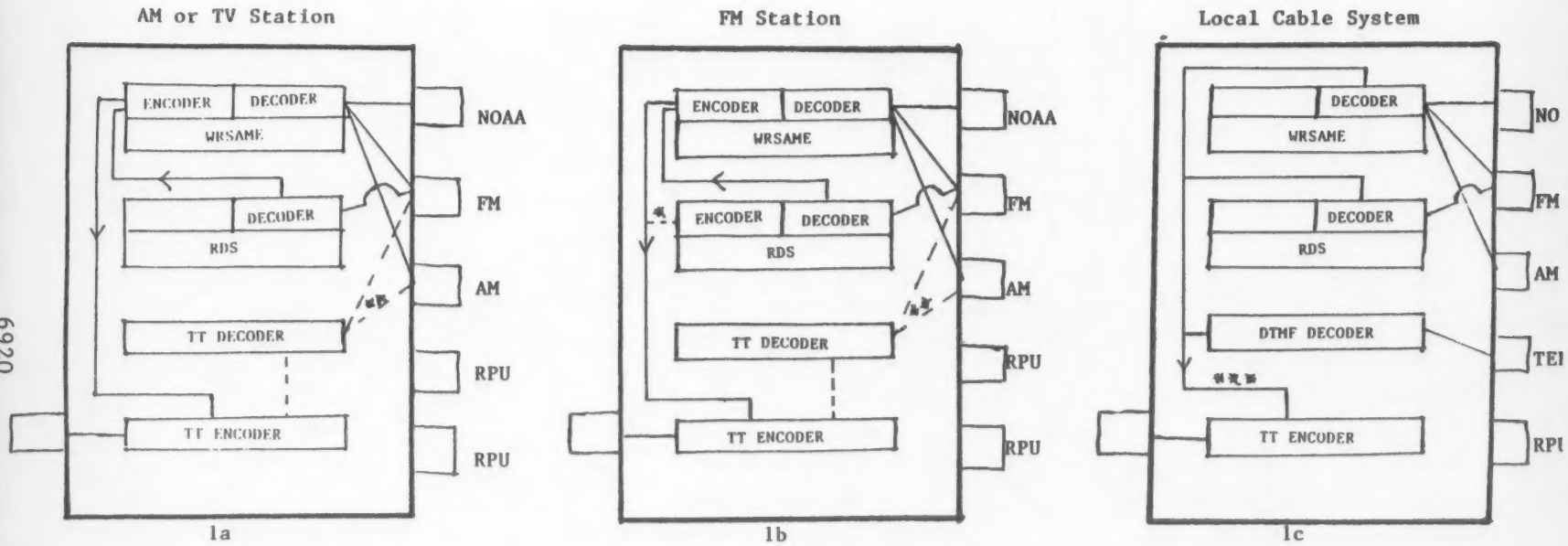
2. A new Section 73.944 is proposed to be added that would read as follows:

73.944 Prohibition of false or deceptive EBS Attention Signal or simulation thereof

No licensee, whether a broadcast station, cable system, network or other non-government industry entity, shall transmit an EBS Attention Signal, special codes, recording or simulation thereof in any circumstance other than in a real national, state or local emergency or for the purpose of an authorized test of the EBS.

FIGURE 1

SYSTEM BOX CONFIGURATIONS



* Optional except FM stations with EBS designations of PEP; CPCS-1, 2, 3, etc.; OPRELAY; RELAY.

** EBS Decoder/receiver tuned to present EBS monitoring assignment until decoder use is discontinued.

*** Use of WRSAME or RDS codes is optional.

NOTE: Old encoder/decoders (with shortened decode time) can be used until new emergency alerting system is in service.

APPENDIX H

TIME LINE FOR IMPLEMENTATION OF EBS EQUIPMENT CHANGES

	7/1/93	1/1/94	7/1/94	7/1/95
Two-tone Encode Times	20-25 seconds	8-25 seconds	8-25 seconds	8-25 seconds
Two-tone Decode	8-16 seconds	3-4 seconds	3-4 seconds	Discontinued
System Box	Optional	Optional	Required	Required

September 17, 1992

STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Amendment of Part 73, Subpart G, of the Commission's Rules Regarding the Emergency Broadcast System (FO Dockets 91-301, 91-171)

The Commission today launches an ambitious program to overhaul the Emergency Broadcast System. That system, which has served the United States well over the last 40 years, was originally created as a national lifeline in times of military attack. Now it is out of date. When the FCC last made major EBS revisions, Leonid Brezhnev occupied the Kremlin, Gerald Ford was in the White House, and a wall still divided Berlin; millions of Americans lived with the possibility that a broadcast of the familiar EBS tone might signal an imminent nuclear attack.

Today, the system serves primarily as an early-warning mechanism during tornadoes, hurricanes and other natural disasters. It is sobering, therefore, to realize that the very events most likely to trigger the EBS are those most likely to paralyze the system itself. That fact was driven home to me earlier this year when I went to my home state for the Winter Convention of the South Carolina Broadcasters Association. I was dismayed to learn there that much of the Emergency Broadcasting System in South Carolina was rendered useless during Hurricane Hugo in 1989. As one broadcaster put it, "Commissioner, dish antennas all over this state were turned into giant Frisbees, and they're somewhere in West Virginia now." The devastating force of Hurricane Hugo broke link after link in the "daisy chain" connecting EBS warning stations throughout the state. At critical moments, broadcasters were unable to warn their listeners or to keep them informed.

The system, we are told, worked rather well during the recent disasters of Hurricanes Andrew and Iniki. Nonetheless, this telling sentence appeared this week in a report from the President of the Florida Association of Broadcasters to Commissioner Barrett, who serves as our EBS Commissioner: "We need to bring EBS into the modern world of satellites, TV and cellular phones." Notwithstanding the fact that the existing EBS network generally held up well in South Florida, and that broadcasters performed often heroic service in their communities throughout the ordeal, more up-to-date alerting capabilities might have moved emergency messages even more effectively.

Our proposals today are aimed at constructing precisely such an up-to-date system: a digital EBS for the 21st Century, with greater redundancy, flexibility and reliability than ever before. I am impressed with the promising new technologies developed for EBS uses to date, and I am encouraged by the number of field tests already under way. One of them, I'm happy to say, may occur in South Carolina. Such tests, combined with the record we expect to gather in this proceeding, will doubtless provide a solid basis for our design of a new system.

One final point: Today's proposal contemplates totally replacing existing EBS equipment and enlisting, for the first time, full participation by cable systems in the EBS--- a revolution which not only will require us to find a new name for our modern alerting system, but also will be expensive. I hope that broadcasters and cable providers will comment directly on the possible costs and that they will help us develop a realistic timetable for converting to a new system.

# # #

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 92-438

In the Matter of	)	
	)	
Advanced Television Systems	)	
and Their Impact upon the	)	MM Docket No. 87-268
Existing Television Broadcast	)	
Service	)	

MEMORANDUM OPINION AND ORDER/THIRD REPORT AND ORDER/
THIRD FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1992 ; Released: October 16, 1992

Comment Date: December 21, 1992
Reply Comment Date: January 29, 1993

By the Commission: Commissioners Marshall and Duggan issuing separate statements.

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I. INTRODUCTION

1. This Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making (Third Report/Third Notice) resolves and in some cases, reconsiders, a number of outstanding issues and solicits further comment on other issues fundamental to implementation of advanced television (ATV) service in this country.[1] This proceeding was initiated in

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[1] ATV refers to any television technology that provides improved audio and video quality or enhances the current television broadcast system. The existing broadcasting system is referred to as NTSC, after the National Television Systems Committee, an industry group established in 1940 to develop technical standards for television broadcasts. The generic term "ATV" includes High Definition Television (HDTV) systems. HDTV systems aim to offer approximately twice the vertical and horizontal resolution of NTSC receivers and to provide picture quality approaching that of 35 mm film and audio quality equal to that of compact discs.

While the issues are obviously interrelated, we have indicated throughout this decision where we are making decisions arising from

July 1987,[2] and in September 1987 we established the Advisory Committee on Advanced Television Service (Advisory Committee) to advise us on the technical and public policy issues concerning ATV.[3]

2. We have previously decided that an ATV system that transmits the increased information of an ATV signal in a separate 6 MHz channel independent from an existing NTSC channel will allow for ATV introduction in the most non-disruptive and efficient manner.[4] We also decided in the Second Report/Further Notice to limit initial eligibility for ATV frequencies to existing broadcasters, to adopt a two-year deadline for broadcasters to apply initially for a paired ATV channel, and a three-year deadline for construction of an ATV facility once assigned. We also sought comment on a number of issues, including proposals to establish a firm date for ATV conversion of 15 years from either selection of an ATV system or the date a Table of ATV Allotments is effective, whichever is later, and to review, in 1998, the propriety of any conversion date we will have set. Also, we solicited comment on various proposals for implementation of a simulcasting requirement.[5]

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reconsideration petitions, final decisions based on comments received in response to Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd 3340 (1992) (Second Report/Further Notice), or asking for additional comment on further questions to be decided. We will issue a codification of the ATV rules we adopt or modify herein, with appropriate effective dates, at a later stage in this proceeding.

2 Notice of Inquiry, 2 FCC Rcd 5125 (1987) (First Inquiry). See also Tentative Decision and Further Notice of Inquiry, 3 FCC Rcd 6520 (1988) (Second Inquiry), First Report and Order, 5 FCC Rcd 5627 (1990) (First Order), Notice of Proposed Rule Making, 6 FCC Rcd 7024 (1991) (Notice), Second Report/Further Notice, supra, and Second Further Notice of Proposed Rule Making, FCC 92-332 (released Aug. 14, 1992) (Second Further Notice).

For a fuller description of the history of this proceeding, see Second Inquiry, 3 FCC Rcd at 6521-6523 & n. 15. See also Notice, 6 FCC Rcd at 7024.

3 The Advisory Committee has established three subcommittees--the Planning Subcommittee (PS), Systems Subcommittee (SS), and Implementation Subcommittee (IS)--which are organized into various working parties (WP). The working parties frequently referred to herein will be designated as follows: Planning Subcommittee Working Party 5 (PSWP5), Systems Subcommittee Working Party 3 (SSWP3), and Implementation Subcommittee Working Party 2 (ISWP2).

4 First Order, 5 FCC Rcd at 5627-29.

5 We received 36 comments, seven reply comments, and several informal comments and reply comments, as well as six petitions for reconsideration and/or clarification following the Second Report/Further Notice, two oppositions to the petitions for reconsideration and/or clarification, five pleadings supporting or commenting on the petitions for reconsideration and/or

3. Among the preliminary decisions we make today, we are granting existing broadcasters three years from the effective date of ATV system selection or an ATV Allotment Table, whichever is later, in which they exclusively may apply for a preferred or "set-aside" ATV channel, and a total of six-years both to apply for and to construct an ATV facility (so that the earlier broadcasters apply, the longer they will have to construct).[6] We are also allowing broadcasters seven years from the effective date of ATV system selection or an ATV Allotment Table, whichever is later, in which to implement 50 percent simulcasting on paired NTSC-ATV stations, and nine years from that same start date to implement 100 percent simulcasting. In addition, broadcasters must convert wholly to ATV (and to cease broadcasting in NTSC) in 15 years.[7] These periods were chosen to encourage the timely and orderly introduction of ATV without disrupting established service or imposing undue risks or costs on broadcasters or the public. The scheduled milestones represent a balancing of many interests and factors and, of necessity, rely on projections regarding the acceptance of ATV by the public and the availability of ATV equipment and programs. Because actual developments may depart from our projections, we also have adopted a timetable for the review of information relating to these time periods. Assuming that we adopt an ATV standard and a table of ATV allotments by late 1993, the review of the indicated deadlines would be completed by these dates:

1993 -- Review of application and construction deadlines

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clarification, and two replies to the oppositions. Pleadings filed after the July 17, 1992, deadline for comments and the August 17, 1992 deadline for reply comments have been treated as informal comments and informal reply comments respectively. We list the parties filing these pleadings and the abbreviations we use for them in Appendix A. The Small Business Administration (SBA) filed a motion for leave to file comments out of time. In light of SBA's role as monitor of agency compliance with statutory regulatory flexibility requirements, see 5 U.S.C. § 612, and the important insights it can offer in this capacity, we grant this motion.

For the convenience of interested parties, unpublished documents to which we refer are listed in Appendix D. These documents have been made part of the docket and are available in the Commission's public reference room. Copies are also available, for a fee, from the Commission's independent contractor, Downtown Copy Center, 1114-21st Street NW, Washington, D.C. 20036, (202) 632-1422.

[6] We sometimes refer herein to the additional 6 MHz channel which existing broadcasters will be awarded on an interim basis for the transition to ATV as the "conversion channel" and to the 6 MHz channel they will be required to surrender at the point of full conversion as the "reversion channel". Second Report/Further Notice, 7 FCC Rcd at 3343.

[7] We will issue a codification of the ATV rules we adopt herein, with appropriate effective dates, at a later point in this proceeding.

1996 -- Review of construction deadline

1999 -- Review of simulcast and conversion deadlines

2002 -- Review of simulcast and conversion deadlines

2008 -- Review of conversion deadline

4. At the appropriate time, we will issue a notice asking for factual information and specific data related to the period or deadline undergoing review. Based on the information received, we will then decide what, if any, adjustments should be made. Recognizing that many important decisions will be made by the public and various segments of the television industry with the adopted dates in mind, we caution all parties that we will not make any changes without substantial justification. This adoption of specific dates and periods will lend the degree of certainty necessary for parties to commit to an undertaking of this magnitude, while a schedule for review will permit the government and industry to adapt to unforeseen circumstances warranting modification of this schedule.

5. On the basis of petitions for reconsideration or clarification of the Second Report/Further Notice, we make the following decisions:

o We reconsider in part our decision regarding the application and construction period. As a preliminary matter, we extend the application deadline to three years after the time that an ATV Allotment Table or an ATV standard is effective, whichever is later, and permit a total of six years for both application and construction to be completed. We provide for further review of this presumptive schedule.

o We decline to modify our policy regarding the secondary status of low power television service stations and further decline to restrict competition for ATV licenses beyond our three-year initial eligibility restriction in order to favor these LPTV and translator stations.

o We adhere to our decision that a firm date for conversion for all broadcasters must be established. We find premature a request for waivers of our conversion policy for applicants proposing to build both NTSC and ATV facilities in an area with low ATV receiver penetration that is unserved by a noncommercial station.

o We adhere to our determination that a 100 percent simulcasting requirement should be adopted at the earliest appropriate time.

6. On the basis of the comments and replies received in response to the Second Report/Further Notice, we take the following actions:

o We reiterate our decision to limit initial eligibility for ATV frequencies to "existing broadcasters." In the event of spectrum shortfall, we will rank initially eligible parties on the basis of their state of operation and construction.

o We temporarily suspend the dual network rule during the transition period to permit networks to give their affiliates a second feed for ATV, and provide for review of this temporary suspension in 1999.

o We decline on procedural grounds to consider the question of the appropriate use for the reversion spectrum that we will reclaim at the time of full conversion to ATV.

o We defer our decision on an assignment methodology until we have determined the approach that we will use for allotting ATV channels.

o We agree to create a noncommercial reserve of ATV spectrum.

o We decline at this time to mandate low power television service conversion to ATV by a certain date.

o We adopt, as a preliminary decision, a deadline for conversion that is 15 years from the effective date of ATV system selection or a final Table of ATV Allotments, whichever is later. We clarify that, in general, broadcasters that do not convert to ATV will have to cease broadcasting in NTSC at the final conversion date.

o We decline to adopt production standards for ATV.

o We adopt, as a preliminary matter, a 50 percent simulcasting requirement, to be imposed one year after the six-year application/construction period ends, and a 100 percent simulcasting requirement to be imposed three years after the application/construction period closes.

o We define simulcasting as the broadcast on the NTSC channel of the same basic material broadcast on the ATV channel, excluding commercials and promotions, within 24-hours. We will not permit the use of the ATV channel of an ATV-NTSC pair for subscription services.

o We decline to take further action with respect to patent licensing.

o We endorse the Advanced Television Systems Committee's plan for documentation of technical specifications once an ATV standard is selected.

o We encourage the efforts of the Advisory Committee to address any new audio developments and decline to intervene at this stage.

o We direct the Advisory Committee to monitor developments in Coded Orthogonal Frequency Division Multiplex technology, and to report to us as appropriate. We defer consideration of the potential use of multiple low power transmitters with proponent ATV systems until the Advisory Committee has completed its study of this issue.

7. We also seek comment on the following issues:

o We seek comment on whether a renewal challenger should be permitted to file a supplemental application for the ATV channel which would be contingent

upon the grant of the challenger's NTSC application. We also seek comment on whether that contingent ATV application should not be subject to a second comparative hearing.

o We seek comment on whether some additional measure of relief or further action should be taken on behalf of noncommercial stations with respect to the presumptive six-year application/construction deadline.

o We seek comment on our proposal to assign an existing broadcaster's ATV channel the same call sign as its NTSC channel, with the addition of an appropriate two-letter suffix.

o We seek comment on whether there is any necessity to exercise our authority under the All Channel Receiver Act to require manufacturers to produce receivers capable of both NTSC and ATV reception and on what the cost to consumers of such a requirement would be.

o We seek comment on whether future advances in technology that are compatible with any ATV standard selected should be permitted on the conversion channel.

o We seek comment on whether to permit the use of ATV channels for ancillary purposes in a manner similar to what is now permitted on NTSC.

II. ELIGIBILITY

A. Initial Eligibility

1. Initial Restriction to "Existing Broadcasters": Background/Report and Order

8. The Second Order/Further Notice limited initial eligibility for ATV frequencies to existing broadcasters. Included in the class of initially eligible parties are: (1) all full-service television broadcast station licensees; (2) permittees authorized as of the date of adoption of the Notice (October 24, 1991); and (3) all parties with applications for a construction permit on file as of October 24, 1991, who are ultimately awarded full-service television broadcast station licenses.[8] We previously stated several reasons for limiting initial ATV eligibility to existing broadcasters.[9] No parties

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[8] Second Report/Further Notice, 7 FCC Rcd at 3343. For the sake of brevity, we sometimes refer to this class of initially eligible parties as "existing broadcasters."

[9] Second Order/Further Notice, 7 FCC Rcd at 3342-43. We continue to believe that these eligibility standards are consistent with the United States Supreme Court's decision in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) and United States v. Storer Broadcasting Co., 351 U.S. 192 (1956). See Second Report/Further Notice, 7 FCC Rcd at 3342-43; Notice, 6 FCC Rcd at 7025. The several reasons noted above and throughout this proceeding for limiting initial eligibility clearly meet the requirement that an agency have an

petition for reconsideration of our decision to limit initial eligibility.[10]

9. In addition, as proposed, after initial assignments are made, we will assign remaining ATV set-side channels to parties who apply after October 24, 1991 for NTSC facilities and who are authorized to construct in the interim period before initial ATV assignments are made.[11] We defer a decision on the manner by which we will permit these parties to apply for ATV channels until we have reached a decision on the assignment methodology applicable to the class of initially eligible broadcasters.[12] We also observe that these parties

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"adequate" basis for limiting Ashbacker rights through rules. Altamont Gas Transmission Co. v. FERC, No. 91-1084, slip op. at 5 (D.C. Cir. June 9, 1992). Moreover, to the extent the "compelling" basis test set forth in Aeronautical Radio, Inc. v. FCC, 928 F. 2d 428 (D.C. Cir. 1991), is correct and applicable here, we also believe this restriction meets that standard as well.

[10] Several parties support this decision. EIA/ATV Committee Comments at ii, 3; NTIA Comments at 7 n.5. NCTA, who does not petition for reconsideration on this issue, nonetheless questions our decision to include permittees and applicants who do not have the same experience that existing broadcasters do in the class of initially eligible existing broadcasters. NCTA Comments at 14-15 n.16. In including permittees and applicants, we avoid depriving parties who invested in television broadcasting before they had clear notice of our intent to phase out NTSC broadcasting at a future date, and to cease permitting broadcasts in NTSC. Parties applying for NTSC channels after the date of the Notice have done so with clear forewarning that they may not be permitted to continue in NTSC at some future point, and may not be able to obtain an ATV channel to continue broadcasting after that point. Cf. Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, 4 FCC Rcd 4780, 4788 (1989), recon. granted in part on other grounds, 5 FCC Rcd 3902 (1990) (certain pending applications excepted from new rules to protect reliance interests). Moreover, in the event that there should be insufficient spectrum to accommodate all initially eligible parties, we explain just below that we will afford priorities among members of this class based on their level of construction and operation.

[11] This group includes (1) parties ultimately awarded a construction permit based on an allotment petition pending as of the date October 24, 1991, regardless of whether or not the permittee had filed the original allotment petition; (2) parties awarded waivers of the current freeze on television broadcast applications in major markets and who are subsequently awarded an NTSC authorization; and (3) any other parties authorized to construct NTSC facilities in the interim period after October 24, 1991. Second Report/Further Notice, 7 FCC Rcd at 3344. We received no comments in response to this proposal. We observe that, as previously stated, once initial ATV assignments are made, we will cease issuing new NTSC licenses. Second Report/Further Notice, 7 FCC Rcd at 3353.

[12] See infra Section IV.

are also free to petition for the addition of an ATV allotment and to apply for any such allotment prior to the close of the ATV application period limited to initially eligible broadcasters. With the exception of the preference given parties who apply for and are awarded NTSC facilities after October 24, 1991, once the initial eligibility period has passed, the application-process will be open to all interested, qualified parties.[13]

2. Ranking: Report and Order

10. Several parties support our proposal to rank initially eligible parties in the event of spectrum shortfall in the following order: (1) licensees and permittees with constructed facilities having program test authority; (2) other permittees; (3) all parties with an application for construction permit pending as of October 24, 1991.[14] We agree with Public Television that ranking eligible parties in this fashion is consonant with our treatment of ATV as an enhancement of existing broadcast service and is likely to expedite the transition to the new technology.[15] For reasons previously given,[16] we decline to afford specific types of full-service broadcasters, such as operating public television stations,[17] priority over others in obtaining a second 6 MHz channel. We also agree with MSTV that we should decline to rank initially eligible parties on the basis of a stricter financial showing,[18] as one party suggests.[19] While it is true that financial criteria help insure speedy ATV implementation by insuring that applicants have the funds necessary to build in a timely fashion, financial requirements are already a part of the broadcast application process.[20] Moreover, broadcast experience and the fact that a broadcaster has a constructed, operational facility will also contribute to speedy ATV

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13 Second Order/Further Notice, 7 FCC Rcd at 3342, 3344-45.

14 Second Report/Further Notice, 7 FCC Rcd at 3343; Joint Broadcasters Comments at 16; Public Television Comments at 10; ATSC Further Comments at 2; MSTV Reply at iii, 6-7.

15 Public Television Comments at 10.

16 Second Report/Further Notice, 7 FCC Rcd at 3343.

17 Public Television Comments at ii, 11-12. Public Television does not make this argument in its reconsideration petition. We address it for the sake of completeness. In response to Joint Broadcasters' concerns about the appropriate inclusion of noncommercial vacant allotments in this group, we adhere to the policies articulated in the Second Report/Further Notice concerning allotment of ATV channels to the noncommercial reserve. 7 FCC Rcd at 3350.

18 MSTV Reply at 7 n. 2.

19 Salvatierra Comments at 1.

20 FCC Form 301, Section III.

implementation. Use of our existing financial criteria, together with ranking on the basis of level of construction and operation, strikes a balance between the need for financial resources and the need for broadcast experience in an operational facility which best serves the public interest.[21] We also clarify, at Brunson's suggestion, that permittees included in the top-priority group are those who have an operational facility at the time ATV applications are accepted for filing, i.e., those permittees with program test authority as of that date.[22] We see no reason to exclude from the first-priority group broadcasters who in fact have constructed and operated facilities at the time ATV applications are accepted. Thus, in the event of a spectrum shortfall, we will rank initially eligible parties in the following order: (1) licensees and permittees with program test authority as of the date ATV applications are accepted; (2) other permittees; (3) parties with applications for a construction permit pending as of October 24, 1991.

B. Renewal Challenges: Reconsideration/Further Notice

11. The Second Report/Further Notice stated that existing broadcasters will be awarded an additional license for the ATV conversion channel, in lieu of treating the addition of an ATV channel as a major modification. We stated that we would not permit an NTSC license to be transferred independently of the associated ATV license, or vice versa.[23] We determined that an applicant for an ATV construction permit would not be allowed to retain priority eligibility status if its NTSC license is not renewed or is revoked while its application is pending. If either the broadcaster's NTSC or ATV license is revoked or not renewed for cause, we will automatically revoke the remaining license. Moreover, we will cease issuing new NTSC licenses once the ATV assignments to existing broadcasters are made. The Second Report/Further Notice determined that ATV licenses will be subject to competing applications filed during the appropriate renewal window. We further decided that ATV and NTSC licenses will be issued so that the license periods run concurrently.[24]

12. We tentatively agree with NCCI that a party challenging the renewal of an NTSC license should be permitted to file a supplemental

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21 We leave open the possibility of using financial requirements to distinguish between those applicants in the first-priority group in the case of insufficient spectrum to accommodate even that group, a question we defer until we decide on an allotment and an assignment methodology.

22 Brunson Comments at 1-4. However, our cut-off date for those applicants to be included in the lower-priority eligibility ranking remains October 24, 1991.

23 Second Report/Further Notice, 7 FCC Rcd at 3344. The Second Report/Further Notice also stated that we will permit a party awarded an ATV license not associated with an NTSC channel pair to broadcast on an assigned ATV channel only (i.e., without an NTSC pair). Id.

24 Second Report and Further Notice, 7 FCC Rcd at 3345.

application for the ATV channel which would be contingent upon the grant of the challenger's NTSC application. We also tentatively agree that the contingent ATV application should not be subject to a second comparative hearing.[25] As stated previously, we do not intend to issue authorizations for new NTSC channels after initial assignments are made. We do propose, however, to issue new NTSC authorizations for a party successfully challenging the renewal of an incumbent NTSC broadcaster, and succeeding to substantially the same broadcast facility.[26] These proposals would apply to renewal challenges filed prior to construction and operation of an ATV facility, where an ATV channel has been awarded or where an ATV application is pending during the period before ATV assignments are made.

13. Earlier in this proceeding, we decided that it was important to preserve existing NTSC service to the public during the transition to ATV.[27] We have also determined that the public interest would be furthered by requiring simulcasting at the earliest appropriate date.[28] Permitting a successful NTSC renewal challenger also to receive the paired ATV channel would further these policies by enabling the ATV and NTSC channel pairs to remain together. We agree with MSTV, however, that the issues which NCCI raises are complex enough to merit full notice and comment and we thus seek comment on these tentative findings and proposals.[29] Parties are also invited to address the effect, if any, this proposal would have on our proposed ATV allotment/assignment plan, which thus far is predicated on existing sites held by existing broadcasters.[30] We also seek comment on the criteria which should be part of any contingent ATV application. Finally, we seek comment on whether these same policies should apply to renewal challenges filed after an NTSC licensee has been awarded an ATV license and its facility is operational, -- i.e., where both channels of an ATV/NTSC pair are on the air.

C. Dual Network Rule: Report and Order

14. The Second Report/Further Notice stated that we would suspend the

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25 NCCI Reconsideration at 3. We tentatively agree with MSTV, however, that if a renewal challenger's NTSC application fails, its contingent ATV application would also fail. MSTV Opposition at 5 n.2.

26 We would also authorize a new NTSC station to replace an existing authorization where an incumbent's NTSC license had been revoked.

27 First Report and Order, 5 FCC Rcd at 5628.

28 Second Report/Further Notice, 7 FCC Rcd at 3355.

29 MSTV Opposition at 5. We decline to issue the clarifications of these issues which NCCI requests until we have the benefit of such additional comments. NCCI Reply at 3-4.

30 MSTV Opposition at 6.

television multiple ownership rules for ATV stations on a limited basis.[31] Existing licensees that are awarded an additional ATV channel may hold both their NTSC and ATV licenses, even though their signals overlap, and group owners may hold both NTSC and paired ATV channels, even though nationwide ceilings may be exceeded, until the time of full conversion. The Second Report/Further Notice also proposed temporary suspension of the dual network rule during the transition period to permit networks to give their affiliates a second feed for ATV.[32]

15. We agree with those commenters who believe that limited suspension of the dual network rule is a necessary step in the implementation of ATV.[33] As we stated in the Second Report/Further Notice, networks are likely to be critical sources of ATV programming at the outset of the ATV transition. Suspension of the rule will facilitate network involvement in ATV's development and help hasten ATV implementation.[34] We will, however, require that any second feed transmitted by a network in a given community be destined

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31 Second Report/Further Notice, 7 FCC Rcd at 3345. The television multiple ownership rules prohibit the award of licenses for TV broadcast stations that result in an applicant directly or indirectly owning or controlling (1) two TV stations with overlapping grade B contours, (2) more than 14 television stations, or 12 stations which are not minority-controlled, and (3) TV stations which have an aggregate national audience reach exceeding 30 percent, or which reach exceeds 25 percent and are not minority-controlled. 47 C.F.R. § 73.3555. See generally Notice of Proposed Rule Making, Review of the Commission's Regulations Governing Television Broadcasting, MM Docket 91-221, 7 FCC Rcd 4111, 4117-18 (Television Rulemaking) (1992).

32 Second Report/Further Notice, 7 FCC Rcd at 3345. The dual network rule prohibits a network from simultaneously operating more than one network of television stations in identical or overlapping geographical areas. 47 C.F.R. §73.658 (g).

33 See, e.g., CapCities Comments at 3-4; CBS Comments at 2-4. See also ATSC Further Comments at 2; Joint Broadcasters Comments at iv, 23 (also favoring suspension of the dual network rule).

34 Second Report/Further Notice, 7 FCC Rcd at 3347. In implementing ATV, stations are not required to convert all of their production facilities to ATV by the construction deadline, but merely to emit an ATV signal. Second Report/Further Notice, 7 FCC Rcd at 3347. Networks or other sources of pass-through capability, requiring less than full studio plant conversion, have been assumed to be one of the earliest ATV capabilities an affiliate station will have. Darby Report at 8, 11, 15 (citing High Definition Television (PBS Engineering Preliminary HDTV Estimates) (Oct. 1990) (PBS Study) and A CBS Work-in-Progress (Oct. 23, 1990, Preliminary Results) (CBS Study), which assume pass-through capability to be the first step in ATV implementation). Thus, in order to facilitate the transition to ATV, permitting affiliates to pass-through network ATV feeds appears essential.

for a station broadcasting in the ATV mode.[35] We will also permit a network to send an ATV feed to a different licensee in the same community, where an NTSC affiliate fails to apply for and/or construct an ATV facility within the required time. Prohibiting a network from feeding an ATV signal to a second affiliate for ATV in a community where the NTSC affiliate has forfeited its right to an ATV channel would deprive viewers in that community of one network's ATV broadcast. It would also impede the transition to ATV by providing less incentive for consumers to purchase ATV receivers. SBA suggests that permitting networks to send an ATV feed to a separate station will harm a network affiliate.[36] As discussed infra, however, low receiver penetration at the start of ATV implementation is likely to make ATV advertising revenues relatively small compared to NTSC revenues.[37] Moreover, should this for some reason not prove true, and should ATV appear to be quite lucrative from the outset, it is likely that the network affiliate will be motivated to implement ATV and thus will not be subject to competition from a separate ATV affiliate. If conditions change as ATV implementation progresses, we can make appropriate adjustments to our policy at the time of our periodic reviews.[38] Accordingly, we temporarily suspend the dual network

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[35] We discuss whether to modify the technical restrictions placed on the use of the conversion channel to permit other advanced uses compatible with the ATV standard we adopt infra Section VI.E.

As several of the commenters have noted, the application of the dual network rule to multiple NTSC channels is being addressed in Television Rulemaking, 7 FCC Rcd at 4117-18; CapCities Comments at 4-5; CBS Comments at 5-6. Our decision herein is subject to modification depending on the outcome of that proceeding.

[36] SBA Comments at 5-7. SBA also assumes that the "independent" carrying the ATV network feed would be left without programming when the NTSC affiliate ultimately converted to ATV. SBA Comments at 6-7. However, SBA offers no factual support for its assumption that such an independent would be unable to find suitable substitute programming, or even that the network would cease its relationship with such an "independent".

[37] See infra Section VII.

[38] See infra Section VI.C. In permitting a network to send an ATV feed to a separate station in the same market where the NTSC affiliate has failed to apply for or construct an ATV facility in the appropriate time frame, we recognize that the NTSC affiliate may in certain cases be able to apply for an ATV allotment in the years following and ultimately be able to offer an ATV channel to the public. In such cases, we will continue to permit a network to affiliate with the separate ATV station. We believe that this approach will provide an incentive for NTSC affiliates to construct ATV facilities as soon as possible. Moreover, despite the existence of separate ATV and NTSC affiliates in a community, the public likely would not be completely deprived of the benefits of simulcast programming. It appears likely that the same ATV network feed sent to NTSC/ATV station pairs would in all likelihood also be sent to any separate ATV affiliate.

rule in the circumstances above described until the time of full conversion.

III. APPLICATION AND CONSTRUCTION PERIOD

A. General Application/Construction Deadlines: Reconsideration/Preliminary Decision

16. Four parties ask us to reconsider or defer our decision to set a deadline for existing broadcasters to apply for an ATV channel of two years from the time that an ATV Allotment Table or an ATV standard is effective, whichever is later, and a deadline for construction of an ATV station of three years. Broadcasters failing to meet these deadlines would forfeit their initial exclusive eligibility for a set-aside channel, but would still remain eligible to apply for any ATV channel at any later date.[39] Recognizing the numerous concerns of the broadcast industry, we are adjusting on reconsideration the application deadline from a two-year to a three-year period, and are providing for a total six-year application and construction period combined, so that a broadcaster applying early would have a correspondingly longer period of time in which to construct an ATV facility. We also schedule further reviews of this preliminary determination. These reviews will be conducted just prior to the start of the application period (at the time an ATV standard or an ATV Allotment Table is effective, whichever is later),[40] and again at the close of the three-year application period.

17. The advent of ATV raises a number of implementation issues for broadcasters. These issues include, for example, raising the necessary capital to invest in this new technology[41] and planning for the creation of a new station delivering a new form of television, a task that in some cases will entail locating a new site for an ATV transmitter.[42] In consideration of these factors, we believe it advisable to extend our application period from

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39 Second Report/Further Notice, 7 FCC Rcd at 3346. NAB, MSTV, Diversified, and Public Television have petitioned for reconsideration of this issue. Several parties filed pleadings in support of reconsideration. See, e.g., Morgan Murphy Reconsideration Comments, Freedom Reconsideration Comments, NASA Reconsideration Comments. The CBS Comments support NASA's Comments supporting the petitions for reconsideration. CBS Comments at 3 n.6. In addition, several parties in their comments and reply comments address these issues. For the sake of completeness, we also consider pleadings other than the reconsideration petitions.

40 Second Report/Further Notice, 7 FCC Rcd at 3347.

41 MSTV Reconsideration at 14; MSTV Reconsideration Reply at 1-5; Darby Report at v; Public Television Reconsideration at 16-17; NASA Reconsideration Comments at 1-4; Morgan Murphy Reconsideration Comments at 2.

42 Cf. MSTV Reconsideration at 15 n.17 (channel specific implementation which requires a suitable site would be a problem in congested areas).

two to three years, as some suggest.[43] This should ease the risks broadcasters may face in investing in this new technology.[44] It also will permit additional time for ATV receivers to become available before broadcasters are on the air,[45] and permit more time for professional equipment to become available, should that be necessary.[46] This adjustment nevertheless continues

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[43] Morgan Murphy Reconsideration Comments at 2-3; NASA Reconsideration Comments at 4. We reiterate that our existing rules governing extensions of time should provide reasonable and effective relief in extenuating circumstances, including local zoning problems and difficulties in obtaining an appropriate site. Second Report/Further Notice, 7 FCC Rcd at 3347-48. We also believe that these policies afford adequate relief for the local land use and safety problems which Sutro claims multiple tower operators face. Sutro Comments at 4. See also FIT Reply at 2. Moreover, to the extent adaptation of such facilities for ATV would involve complex technical planning issues, as Sutro claims, the additional year we permit for applications and the applying a "sliding scale" approach to construction times, discussed just below in this Section, should provide sufficient time for resolution of such problems. Sutro Comments at 2-3.

[44] MSTV Reply at 15-16.

[45] MSTV Reply at 17. FCC Advisory Committee on Advanced Television Service, Contribution to the Fifth Interim Report of the Implementation Subcommittee from Working Party 2 on Transition Scenarios at 12 (Jan. 31, 1992) (ISWP2 Fifth Interim Report) (receivers will be available two and a half to three years after selection of a standard, with system proponents having a six-to-nine-month advantage; report states that these results are being validated); in Fifth Interim Report of the FCC Advisory Committee on Advanced Television Service, Appendix I (Mar. 24, 1992); Market Penetration of HDTV, Working Party Five Planning Subcommittee, Advisory Committee on Advanced Television Service at 19-20 (June 20, 1992) (PSWP5 1992 Study) (most optimistic projection is that critical unit for ATV sets, the display, will be available 18 months after system selection). The modifications we make to our application/construction deadlines should satisfy the concerns of some parties that receivers be available within the timetable we establish. NAB Reconsideration at 20; MSTV Reply at 17.

[46] Contrary to NAB's concerns, studies of ISWP2 to date regarding antennas and towers indicate that with appropriate planning on the part of broadcasters, there is sufficient capacity within the transmitter/antenna manufacturing industry to meet broadcaster demand even within the five-year application/construction period we initially established. NAB Reconsideration at 17; FCC Advisory Committee on Advanced Television Service, Implementation Subcommittee Working Party 2 on Transition Scenarios, Transmitter and Antenna Manufacturer Survey, at 1 (Aug. 24, 1992) (ISWP2 Transmitter and Antenna Manufacturer Survey). ISWP2, however, describes potential limitations on the number of towers that can be built and antennas that can be installed, caused by manpower shortages and seasonal delays. ISWP2 Transmitter and Antenna Manufacturer Survey at 4-6. The modifications we make to our application and construction deadlines should lessen the significance of such limitations.

to safeguard against "warehousing" of valuable spectrum, a concern voiced by one party.[47] Thus, on balance, we believe that this modification aligns our deadlines more closely with projections about the ATV marketplace and encourages productive development of the new ATV technology.

18. In addition, we will permit broadcasters applying before the end of the three-year application period to have the remainder of the application period, as well as the subsequent three-year construction period, to build their ATV facility.[48] Upon reconsideration, we believe that we should recognize the extra efforts of those pioneers who apply first for ATV channels, by permitting them a longer period to resolve any implementation difficulties that such early entry may pose for construction.[49] In effect, construction deadlines will apply to existing broadcasters on a sliding scale, with those applying early having a longer portion of the six-year application/construction period to devote to construction of ATV facilities.[50] This modification should permit those applying early additional time to cope with any unforeseen problems that arise. It should also give group owners more flexibility to move manpower resources from station to station, resulting in economies for them.[51] It will also permit broadcasters to take advantage of

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Moreover, we shall consider whether such limitations are likely to develop when we review the implementation deadlines at the time we establish an ATV standard/Allotment Table. At that point, we can gauge better how the technical attributes of a system may affect these issues, as well as whether manpower limitations appear likely to develop. See generally Memorandum by Jules Cohen and Associates (June 19, 1990), in CBS Study, Appendix A (new tower requirements projected for ATV believed to be exaggerated). Moreover, existing rules provide for extensions of time for lack of available equipment. Second Report/Further Notice, 7 FCC Rcd at 3347-48. In addition, we recognize that ISWP2 is still surveying other types of professional equipment manufacturers. The results of that study can be factored into our implementation reviews.

47 Island Comments at 6.

48 Cf. Diversified Reconsideration at 5 (construction deadlines should be staggered in reverse order of application filings but also advocating that initial application deadlines be staggered according to market size).

49 See generally Comments of S. Merrill Weiss, Consultant (filed Dec. 20, 1991) (advocating sliding scale).

50 We emphasize, however, that broadcasters must file an application for an ATV channel within the three-year application period, or else they will forfeit their initial eligibility status.

51 NAB Reconsideration at 13; ISWP2 Fifth Interim Report at 5-6. In addition, to the extent a lack of broadcast consultants develops, as some predict, see NAB Reconsideration at 12-13; MSTV Reply at 19 n.10, this additional flexibility should help ease any such shortage.

economies in equipment, to the extent such economies materialize over time.[52] We also believe that this schedule permits adequate time for ATV programming to become available for broadcasters' use.[53] Contrary to some parties' views,[54] we now have adequate data upon which to base a preliminary determination of application and construction times.

19. In view of the significance of the initial steps in the transition to ATV and their scheduling for broadcasters, we will review the suitability

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[52] The Darby Report projects considerable economies resulting from declining professional equipment costs for ATV. Darby Report at iv. However, it is unclear from the study whether these include costs for antennas and transmitters, which broadcasters would be required to purchase by the close of the initial implementation period, as well as for studio and production equipment, which are not subject to any regulatory deadlines. With respect to the former category, there is evidence in the record that these costs may be comparable to those for NTSC equivalent equipment, even as an initial matter. See discussion of antenna costs infra Section VII.B. Thus, the record as it now stands does not support parties' claims that the application/construction deadlines would result in higher than necessary prices of equipment needed to comply with this timetable. See, e.g., NAB Reconsideration at 12-16, 21-22. However, the modifications made herein to the application/construction deadline would allow broadcasters to take advantage of any such economies, should they, contrary to our expectations, occur. We also observe that, if the Darby Report is referring to the second category of equipment, including studio and production equipment, broadcasters are under no regulatory requirements to implement local production capacity by any deadline. Moreover, assuming stations would want to have ATV studio and production capability by the time they are required to convert, the report does not demonstrate that 15 years would be insufficient to permit economies to develop. Such economies would occur, in fact, if different stations converted their studio and production capabilities to ATV over time throughout the 15-year conversion period. The development of those economies would, in turn, ease the corresponding investment required of smaller (and possible later converting) stations, for which some parties express particular concern. MSTV Reconsideration Reply at 5; MSTV Reply at 15-16; NAB Reconsideration at 11-12, 22.

[53] FCC Advisory Committee on Advanced Television Service, Implementation Subcommittee Working Party 2 on Transition Scenarios, Report on Survey Regarding Software Availability at 1, 5 (Aug. 24, 1992) (ISWP2 Software Survey). Cf. PSWP5 1992 Study at 17-19 (cost of ATV programs no greater than film, although perfectionist efforts generated by detail possible in ATV tend to extend shooting time; ATV post-production results in savings over NTSC); see infra Section VI.C (discussing ISWP2 Software Study projections of availability of suitable ATV programming).

[54] See, e.g., NAB Reconsideration at iii, 4, 26; MSTV Reconsideration at 2, 4.

of these deadlines at the time of our periodic reviews.[55] We will review both the three-year application and the overall six-year application/construction period deadline at the time an ATV standard or Allotment Table is effective, whichever is later, and again review the overall six-year deadline at the close of the application period. After a standard is selected, we will be in a better position to judge factors relevant to initial implementation and expect to have the benefit of additional Advisory Committee reports on professional and consumer availability and costs.[56] At the time of our second review, at the close of the application period, we should be better able to discern whether the projections upon which we have relied are likely to be borne out in actual practice, and to make any necessary adjustments. For example, we should be able to assess factors such as the availability of ATV receivers, and the interchangeability of ATV and NTSC professional equipment, factors creating implementation incentives and economies, respectively, for broadcasters. We will also be able to evaluate our application/construction deadlines in light of other information relevant to the construction process, e.g., the transmission standard and the power levels (and associated costs) for operating under that standard,[57] or the amount of time it takes to develop technical specifications for producing consumer and professional equipment compatible with the ATV standard adopted.[58]

20. We decline to defer a judgment concerning an application/construction schedule, as some urge.[59] These deadlines will assist in our reclamation of the reversion channel by ensuring that broadcasters have an operational second facility to which they can ultimately convert fully to ATV. Although we recognize that some stations are likely to be market leaders

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[55] We defer addressing parties' concerns regarding the interrelationship of the application period to assignments until we decide on an assignment methodology. See, e.g., MSTV Reconsideration at 11 n.5. See infra Section IV.A.

[56] See supra note 46. In addition to expected reports from ISWP2, SSWP3 is expected to produce reports on professional and consumer equipment costs. As is the case for modifications to our preliminary conversion and simulcasting timetables, we will modify our application/construction schedule upon a substantial showing that such a change would further the public interest. See infra Sections VI.C, VII.A.

[57] Freedom Reconsideration Comments at 7.

[58] NAB Reconsideration at 19 (expressing concern that delay in developing technical specifications can hold up ATV implementation). We note in this respect that ATSC has already begun organizing industry groups for this effort. See infra Section VIII.

[59] MSTV Reconsideration at ii, 1-3; NAB Reconsideration at i-ii, iv-v, 4, 26 (arguing for deferral of a decision on the construction period only). See also NASA Reconsideration Comments at 4 (seeking deferral of a decision on construction period only); MSTV Reconsideration Reply at 6; Freedom Reconsideration Comments at 7; MSTV Reply at 14.

in the implementation of ATV under the schedule we adopt,[60] we continue to believe such leadership may never emerge, at least in certain markets, unless we establish a clear framework for the ATV transition. In the absence of deadlines for application and construction, stations may unduly delay ATV implementation while waiting for others to move ahead.[61]

21. We also do not believe that preliminary establishment of a six-year period for application and construction, with built-in reviews before the period actually begins to run, and again at the close of the application period, will force broadcasters into premature or counterproductive investment, as some allege.[62] We adhere to our view that broadcasters need ample notice of the ATV implementation time periods. Moreover, failure to meet those time requirements will mean forfeiture of initial eligibility status only.[63] Should it develop, contrary to our expectations, that marketplace factors deter additional ATV investment in a given community within the time periods we set out, it is unlikely that other parties would apply for and construct an ATV facility in such an area. In such case, a broadcaster would face little actual risk of being foreclosed from the opportunity to convert at a later date to ATV on one of the set-aside channels. On the other hand, should the marketplace favor investment, we see no reason to foreclose other qualified parties from applying for an ATV station and from bringing this new technology to that community in an expeditious fashion if incumbents do not.

22. We also decline to leave determination of initial application and construction periods to individual broadcasters' decisions as some suggest.[64] As suggested by NTIA, our initial eligibility restriction will protect broadcasters from unfettered competition from new entrants who might have a strong economic interest in speeding ATV development and who would thereby create pressure for broadcasters to keep pace. As NTIA suggests, a timetable for ATV development substitutes for the market forces that would otherwise operate to speed ATV implementation.[65] As some of those who concur in our initial decision to establish a five-year implementation period state, such a fixed period will encourage rapid development of ATV transmission capability and delivery of this new technology to the American public.[66]

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60 NAB Reconsideration at 10.

61 Second Report/Further Notice, 7 FCC Rcd at 3346.

62 MSTV Reconsideration at 13, 14; MSTV Reply at 14. See also NASA Reconsideration Comments at 2.

63 Second Report/Further Notice, 7 FCC Rcd at 3346.

64 Brechner Comments at 5; GHI Comments at 4; Diversified Reconsideration at 3.

65 NTIA Comments at 11.

66 See, e.g., EIA/ATV Committee Comments at ii, 3-5.

23. Contrary to NAB's claim, Advisory Committee reports amply supported a five-year application/construction period and, a fortiori, the modified six-year period we now establish.[67] ISWP2 projects total implementation time, from "start to on-air",[68] as ranging from a minimum of about one and a half years, to a typical time of slightly over two years, if an existing tower is used, and from a minimum of slightly under two years to a typical time of slightly more than three-and-a-half years if a new tower is required.[69] Broadcasters can therefore apply for and construct new ATV facilities within the six-year period we establish.[70] In addition, our existing policies on granting extensions will provide relief for extraordinary delays in obtaining government approvals or resulting from litigation, responding to NAB's concerns on this point.[71]

24. Contrary to MSTV's position, we do not believe that the Darby Report, upon close analysis, necessarily conflicts with our implementation schedule.[72] MSTV stresses the Darby Report's projection of the costs per station of implementing full ATV capability, estimated at $10-12 million, over

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[67] NAB Reconsideration at 9-10, 14-21.

[68] For ISWP2, "[s]tart to [o]n-[a]ir time is from the station beginning the implementation process to the station being on the air with programming," in contrast to "CP to [o]n-[a]ir time," which runs "from issuance of the FCC [c]onstruction [p]ermit to the station being on the air with programming." ISWP2 Fifth Interim Report at 9.

[69] ISWP2 Fifth Interim Report at 9 (estimates for a "pass-through" facility).

[70] MSTV states that the Second Report/Further Notice improperly interpreted the CBS Study as finding that major markets will begin construction five years after selection of an ATV standard. MSTV states that in fact the CBS Study made no assumption as to the historical date that major markets would first begin construction, but merely labeled that point Year 1. MSTV Reconsideration at 4. The Second Report/Further Notice and the Notice upon which it was based, however, make no such explicit interpretation. See, e.g., Second Report/Further Notice, 7 FCC Rcd at 3354 n. 156; Notice, 6 FCC Rcd at 7027 n.33. We also observe that the Darby Report submitted by MSTV states that the CBS Study "hypothesizes that the largest 30 stations will begin construction immediately after the necessary regulatory standards are defined and regulatory clearances are achieved." Darby Report at 12.

[71] See generally Second Report/Further Notice, 7 FCC Rcd at 3347-48 & nn 63-65; NAB Reconsideration at 14, 16-17; MSTV Reply at 19 n.10. We thus also decline to adopt an even more flexible approach to granting extensions for delays in obtaining local government approvals or to preempt local land use controls, as Sutro asks. Sutro Comments at 2-3.

[72] MSTV Reconsideration Reply at 1-6.

a five-year application/construction period.[73] However, we are merely requiring that a station emit an ATV signal by the end of six years.[74] "Pass-through" of a network or other ATV signal source[75] would substantially satisfy our construction requirement. The Darby Report estimates "pass-through" costs at $1.5 million per station. It notes that the large portion of the total $10-12-million figure is attributable to ATV functionality in addition to pass-through capability.[76] That additional functionality may be phased in at any time. Thus, the estimated financial resources necessary to apply and construct within the six-year period we now establish are considerably less than the investment estimated for full studio and production facilities.

25. It may be true, as Darby projects, that initial ATV receiver penetration will be low.[77] Indeed, as PSWP5 suggests, ATV penetration will be directly limited by the rate at which local television stations convert their plant for ATV terrestrial transmission.[78] Until a substantial number of broadcast stations are on the air, therefore, ATV penetration, and consequently revenues from ATV operations, may well be low. Allowing broadcast stations to delay implementation, as MSTV suggests,[79] will do nothing to effectuate a consumer transition to ATV. Rather, such delay would act against public interest goals of accomplishing a swift ATV transition, and against broadcasters' goals of maximizing transitional revenues from their ATV channel.[80] In this connection we expect that alternative media (possibly including cable, VCR, DBS and computers) will begin ATV implementation

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73 MSTV Reconsideration Reply at 3. See, e.g., Darby Report at Table 6.

74 Second Report/Further Notice, 7 FCC Rcd at 3347.

75 Other non-network signal sources would be used, for example, by an independent station.

76 Darby Report at iv.

77 Darby Report at 29-31. We compare Darby's penetration scenario with those of the Advisory Committee, infra Section VI.B.

78 PSWP5 1992 Study at iv.

79 MSTV Reconsideration Reply at 6.

80 Some parties stress that other industry sectors, not subject to our implementation deadlines, are likely to benefit from broadcasters' implementation of ATV. MSTV Reconsideration Reply at 1-5, 6-7; Darby Report at 47. However, unlike the television broadcast industry, none of these industries has been afforded the interim use of a valuable national resource, a television broadcast channel, solely for the purpose of implementing ATV. See generally First Inquiry, 2 FCC Rcd at 5125 (referring to MSTV petition which initiated this proceeding). We thus do not have the same responsibility to ensure spectrum efficiency with respect to these other industries. Nevertheless, we expect that alternative media will participate early and fully in the transition to ATV. See discussion Section IX.A.

promptly, thereby exerting additional competitive pressures on broadcasters to begin the transition to ATV. We believe that this expectation is reasonable, based on the steps which both the Advisory Committee and this Commission have taken to insure that our ATV standard is compatible with these alternative media,[81] and in light of some industries' participation in the ATV standard selection process and Advisory Committee activities.[82] In addition, contrary to some requests,[83] we adhere to our decision not to make ATV receiver penetration a factor in granting individual construction permit extensions or extending application/construction time.[84] As stated previously, we will take into account any new data regarding ATV receiver availability and projected penetration rates at the time of our reviews of the application and construction deadlines. In providing for this adjustment mechanism, we mean to allay concerns, such as those raised by MSTV, that broadcasters will be forced to make investments that are premature and ill-suited to marketplace realities.[85]

26. We believe that the above modifications are preferable to relaxing the financial qualifications a television broadcast applicant must demonstrate after applying for an ATV channel. NAB argues that relaxed financial requirements would permit broadcasters to take better advantage of economies of scope.[86] However, our extension of the application period and the sliding

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[81] See infra Section IX; Second Report/Further Notice, 7 FCC Rcd at 3359-61.

[82] CableLabs, for example, entered into agreements with the Advanced Television Test Center, the Advisory Committee, and the FCC, whereby CableLabs and the Test Center would serve as fora for testing of the proponent ATV systems. See also infra Section IX.A; PSWP5 1992 Study at 9 (possible that inauguration of ATV cable service in some major metropolitan areas will take place shortly after selection of ATV standard and when display units are available)

[83] MSTV Reconsideration at 13-14; NAB Reconsideration at 6, 20; Diversified Reconsideration at 6. MSTV believes that if broadcasters drive receiver penetration, they will produce substantial external benefits for the equipment and programming sectors of the economy, but will not be able to share in these benefits. We believe, however, that the successful development of ATV is likely to require synergy among these various sectors. As we stated previously, the availability of ATV programming to the public is likely to be a major factor driving ATV receiver penetration. Unless broadcast stations are transmitting ATV programs, such programming is unlikely to be available in sufficient quantity to stimulate receiver sales. EIA/ATV Committee illustrates this point with the example of color television development, where receiver sales were very low until color programming became more available on an extensive basis. EIA/ATV Committee Comments at 4 n.7.

[84] Second Report/Further Notice, 7 FCC Rcd at 3348.

[85] MSTV Reconsideration at 14; MSTV Reply at 14.

[86] NAB Reconsideration at 8, 9.

scale we apply to construction deadlines will also do that.[87] Our existing rules require that a broadcast station applicant show that it has reasonable assurance of committed sources of funds to construct and operate a broadcast facility for three months.[88] To require less, as some suggest,[89] would permit the award of a construction permit to a broadcaster without reasonable assurance of its being able to fund the construction. This would increase the probability that applicants would "tie up" ATV spectrum for the three-year construction period without ever obtaining the funds needed to build the facility. This is contrary to one of the reasons we are restricting initial eligibility to existing broadcasters in the first place -- i.e., their ability to implement ATV swiftly. We similarly decline to modify our adherence to existing rules which do not permit an extension of a construction permit for inability to obtain financing,[90] as some ask.[91] As Salvatierra suggests, relaxation of this policy would jeopardize our goal of prompt implementation of ATV facilities.[92]

27. We also do not adopt a staggered approach to initial ATV implementation, with large markets implementing first and small markets last, as some parties ask.[93] We recognize that many small market stations produce less revenue than many large market stations, and consequently may find it more difficult to finance a transition to ATV. We believe that our extension of the application period and our "sliding scale" approach to construction

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87 NAB expresses concern about broadcasters' ability to apply early under a first-come, first-served assignment process without a more relaxed financial qualification requirement. NAB Reconsideration at 8, 9. As stated supra, note 55, we are deferring questions regarding the interrelationship of the application period with the assignment process until we adopt an assignment methodology. See infra Section IV.A.

88 Harrison County Broadcasting Co., 6 FCC Rcd 5819, 5821 (Rev. Bd. 1991); FCC Form 301, Instructions, Section III.

89 NAB Reconsideration at 8-9; GHI Comments at 2, 5. See also NASA Reconsideration Comments at 2-5 (arguing for both three year application period and relaxed financial requirement).

90 Second Report/Further Notice, 7 FCC Rcd at 3348.

91 NAB Reconsideration at 5, 26 n.39 (asking for extension policy that would permit a demonstration of financial incapability of constructing according to schedule, but of a scheduled capability by a date certain); Brechner Comments at 4-5, 6 (relief for financial hardship necessary for small market stations). See also GHI Reconsideration Comments at 2-3.

92 Salvatierra Comments at 5-6.

93 See, e.g., NAB Reconsideration at 27-29; Freedom Reconsideration Comments at 5-6; Morgan Murphy Reconsideration Comments at 3; NASA Reconsideration Comments at 4. See generally MSTV Reconsideration at 13.

periods should provide such stations adequate relief.[94] Should it appear, contrary to our expectations, that these time periods are insufficient, we have a mechanism in place to adjust them prior to the onset of implementation, and again at our projected midpoint. We also reiterate that failure to meet these deadlines forecloses initial eligibility only. A station will be free to petition for an available allotment or apply on a non-priority basis for any such channel allotments which are added at any time. Moreover, we do not believe that staggering by market size, as some commenters propose, would necessarily achieve the desired result. Even in the smallest markets, industry figures show that the most profitable group of stations, which accounted for one quarter of all stations, made an average of $923,495 in pre-tax profits in 1990. In contrast, even in the top ten markets, the bottom quarter stations lost money on average.[95] For this reason, a staggered approach[96] would not necessarily target the correct stations, might cause administrative delays and ultimately could impede the activation of ATV service.

B. Noncommercial Stations: Reconsideration/Further Notice

28. Public Television states that noncommercial entities require substantial periods of time to arrange financing of the magnitude required for the ATV transition.[97] We recognize that noncommercial licensees, unlike commercial television entities, rely on government appropriations at the state and federal levels, on foundation grants, and on corporate and viewer donations. Given this fact, and in light of the unique role noncommercial stations play in our television broadcasting system, we invite comment on

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[94] These modifications should make possible additional economies of scale and permit group owners more flexibility to construct their stations at different times within the operative deadlines, results similar to those which some parties argue staggering would afford. See, e.g., NAB Reconsideration at 11-12. We observe that the changes we adopt permit group owners to decide for themselves the chronology for station implementation in their group, as opposed to setting mandatory deadlines under a staggered approach.

[95] NAB/BCFM Television Financial Report at 1, 16 (1991). NAB tacitly acknowledges this when it argues that even if we set an early deadline for the largest markets only, we would still need to provide relief for small, financially less capable stations in the largest markets. NAB Reconsideration at 29 n.42.

[96] NAB Reconsideration at 28-29 (stagger application/construction with largest markets beginning first); Diversified Reconsideration at 2, 4-5 (stagger initial filing deadlines based on market size, with construction periods staggered in reverse order of filing).

[97] Public Television argues for deferral of the issue of application deadlines for noncommercial stations or, alternatively, for an application period greater than the two years adopted in the Second Report/Further Notice or, alternatively, for a relaxed financial qualification requirement. Public Television Reconsideration at 3, 13-15.

whether some additional measure of relief or further actions should be taken on their behalf to facilitate their entry into ATV.

29. While we decline to defer setting an application deadline for noncommercial stations until the time that we revisit our cut-over date for ATV conversion, as Public Television suggests,[98] we will consider whether special measures should be taken in consideration of the unique circumstances which noncommercial stations face. A variety of alternatives, ranging from a special application period to relaxed financial requirements, are possible.[99] This latter proposal would eliminate the pressure which noncommercial stations may face in obtaining funding within our application period. However, under this approach, if a noncommercial station ultimately fails to obtain the funding necessary to construct, its ATV channel would remain unused and unavailable to other qualified noncommercial applicants until the construction period expires. We might also intensify our coordination with funding agencies such as the National Telecommunications and Information Administration (NTIA). This might enable us to stagger noncommercial application deadlines so as to harmonize them with available funding. On the other hand, we question the feasibility of establishing such coordination with all possible funding sources. Such an approach would also add to the administrative burden of implementing ATV. We also observe that the modifications we make to our application and construction deadlines herein, as well as the establishment of a reserve, discussed below, should provide at least some of the relief which Public Television seeks.[100] We seek comment on the advisability of the above alternatives, and on any others that interested parties may propose.

C. Other Issues

1. Assignment of Call Signs: Further Notice

30. After the adoption of a Table of Allotments, we will assign over 1880 new ATV channels.[101] Most of these assignments will be to existing broadcasters. These ATV channels will require some form of station

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[98] Public Television Reconsideration at 16-17.

[99] Public Television Reconsideration at 3-4, 9, 12, 17. Public Television argues that noncommercial stations would be particularly constrained if a first-come, first-served assignment approach were adopted. Public Television Reconsideration at 26. As stated infra Section IV.A, however, we defer adoption of an assignment methodology until we have decided on an allotment approach.

[100] Moreover, our periodic reviews of the application/construction deadlines should enable us to take account of any conditions which our presumptive schedule does not adequately address.

[101] There are approximately 14,000 possible call signs currently available. Presently, we assign call signs on a first-come, first-served basis after a construction permit is awarded. 47 C.F.R. § 73.3550(h).

identification. If existing broadcasters use the existing call sign of their NTSC channels for their ATV pairs, they will be able to benefit from the name recognition and good will associated with their present call signs. Use of the same call sign would facilitate consumers' transition to ATV by making clear that the ATV/NTSC channel pairs are associated with the same broadcaster. We might also add a suffix to each ATV call sign, such as -AT or -HD, to help the public distinguish between the ATV and NTSC channels of the pair. Use of the same call signs (with the exception of the ATV suffix) for the stations controlled by the same broadcaster suggests an identity between the stations. This approach would thus reinforce our simulcasting policy, which will at the earliest appropriate point require the transmission of the same program on both channels. Since it would not require assigning new call signs, this proposal also would be administratively efficient. For the above reasons, at the time an ATV construction permit is awarded to an existing broadcaster, we propose to assign the ATV channel the same call sign as the NTSC channel currently in use, with the addition of an appropriate two-letter suffix. We seek comment on this proposal and, specifically, on the suffix that would best identify the ATV channel.

2. Other Spectrum Uses: Reconsideration/Report and Order

31. In its comments, LMCC urges that we modify our regulatory approach to initial ATV implementation to allow ATV conversion channels that are not used during our initial application/construction period to be allocated for alternative non-broadcast use by other parties.[102] We agree with NAB and MSTV, however, that this approach would be inconsistent with our previous ruling to open such channels to other qualified television broadcast applicants.[103] On a related matter, Brechner asks that we permit proposed users of reversion channels that are to be returned by broadcasters (at the point of conversion) to expedite conversion by helping to finance its costs.[104] Although we make no decision on whether a marketplace solution of this nature might eventually be appropriate for ATV, we believe that it is prematurely raised at this time. We also find that the question of the appropriate use for the reversion spectrum that we will reclaim at the time of full conversion is beyond the scope of this proceeding.[105]

IV. ALLOTMENT/ASSIGNMENT ISSUES

A. Assignment Methodology: Report and Order

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[102] LMCC Comments at 4-5. LMCC also argues for alternative uses for spectrum reclaimed at the time of conversion. LMCC Comments at 5.

[103] NAB Reply at 8-9; MSTV Reply at iii, 8-9; Second Report/Further Notice, 7 FCC Rcd at 3344-45. See also Zenith Reply at 9.

[104] Brechner Comments at 4-5.

[105] See also discussion infra Section VI.D regarding NTIA's flexible use proposal.

32. The Second Report/Further Notice proposed an ATV assignment methodology.[106] Under this proposal, at the time the Further Notice proposing the Final Table of Allotments is issued, broadcasters would have a fixed period of time to negotiate with each other and submit plans for pairing NTSC and ATV channels either nationwide or on a market-by-market basis. Once the negotiation period ends, channels in markets where negotiations fail to produce an acceptable pairing plan would be assigned on a first-come, first-served basis. A "random ranking" procedure would be used in the case of simultaneously filed applications.[107] We defer a decision on assignment methodology until comments on the recently released Second Further Notice, supra, are submitted and we have decided on an allotment methodology.

B. Noncommercial Reserve: Report and Order

33. The Second Report/Further Notice adopted several special measures designed to protect vacant noncommercial allotments. For example, we stated that vacant noncommercial allotments will be used for ATV only where there is no feasible alternative for assigning an ATV channel to an existing broadcaster. Vacant noncommercial allotments will be left without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel, according to the Second Report/Further Notice.[108]

34. We agree with Public Television that, regardless of the assignment methodology ultimately adopted,[109] we should take an additional measure on behalf of noncommercial interests: creation of a noncommercial reserve. Such a reserve will ensure that ATV channels created for vacant NTSC noncommercial allotments are available only to qualified noncommercial parties. It will also ensure that noncommercial entities do not face renewal challenges from commercial applicants.[110] Should we decide to assign ATV channels by pairing them with NTSC channels, as some propose,[111] we will, as Public Television requests, create a reserve at that time.[112] Should we adopt another methodology, such as first-come, first-served, we will reserve noncommercial channels at the time initial assignments to noncommercial entities are made.

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106 As a technical matter, spectrum space is "allocated" to a particular service. Allocated channels are then "allotted" to specific geographic areas, and "allotted" channels are then "assigned" to a licensee. Second Report/Further Notice, 7 FCC Rcd at 3370.

107 Second Report/Further Notice, 7 FCC Rcd at 3349.

108 Second Report/Further Notice, 7 FCC Rcd at 3350.

109 See supra Section IV.A.

110 Public Television Reconsideration at 2, 7-11.

111 Public Television Reconsideration at 9-11; Joint Broadcasters Comments at i-ii, 4-10.

112 Public Television Reconsideration at 9-11.

It is possible, however, that after initial assignments are made, vacant ATV allotments which correspond with NTSC noncommercial stations[113] or reserve channels will remain unassigned, and more than one channel will be available which could be assigned to a noncommercial station or vacant allotment. Should this occur, we will initiate a general rulemaking to determine the methodology we should employ for the designation of reserved channels.[114] We disagree with Public Television that even if first-come, first-served assignment is used, we should create a noncommercial reserve prior to initial assignments in a Final Table of Allotments.[115] We recognize, as we have previously, the unique importance of noncommercial stations.[116] The creation of a spectrum reserve and other measures we have taken reflect that concern. Nevertheless, the primary purpose of a first-come, first-served approach would be to give parties able to construct ATV stations expeditiously their preferred channels. It would contradict this objective to give priority to a reserve for parties that may not come forward to build for several years and may not even now exist. In addition, we do not believe that the differences between the ATV channels allotted will be so significant as to cause a serious disadvantage to any noncommercial broadcaster who receives a channel at the end of the assignment process.

V. LOW POWER AND TRANSLATOR SERVICES

A. Secondary Status and Other Issues: Reconsideration

35. The Second Report/Further Notice concluded that it would probably be necessary for new ATV assignments to displace at least some low-power television (LPTV) and translator service stations in major markets, although the impact of displacement would likely be less severe in rural areas.[117] We

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[113] This might happen under a first-come, first served assignment approach if an NTSC noncommercial station did not apply among the first stations in its community and there is more than one ATV allotment that could conceivably could be paired with that station's NTSC channel.

[114] We thus decline to establish criteria such as Public Television suggests for setting aside reserve channels at this time. Public Television Reconsideration at 12 n.11.

[115] Public Television Reconsideration at 5,7.

[116] Second Report/Further Notice, 7 FCC Rcd at 3350.

[117] A low power television station (LPTV) is a broadcast television facility with secondary service status that is authorized at maximum power levels lower than those of full-service television stations. Low-power stations may retransmit the programs of a full-service station and may originate programming. Translators are low-power stations that do not originate programming in excess of 30 seconds an hour and that retransmit the signals of a full-service station. 47 C.F.R. § 74.701 (a), (f). A television translator may become an LPTV by filing a letter of notification. LPTVs and translators are governed generally by the same rules. See generally 47 C.F.R.

found that LPTVs and translators, as secondary services, must yield to new full-power ATV stations.[118] We found that there is insufficient spectrum to include LPTVs and translators in the initial eligibility for an ATV frequency on either a primary or secondary basis or generally to factor in LPTV displacement considerations in making ATV assignments.[119] However, we adopted several measures designed to help mitigate the effects of displacement, e.g., we continued to permit a displaced low power TV station to file for a noncompetitive replacement channel in the same community, and stated that we would initiate a rulemaking considering certain specific NTSC interference protection rule changes that had been requested.[120]

36. On reconsideration, Polar argues that the LPTV industry must be included in our regulatory approach so that ATV can be introduced as quickly and efficiently as possible. Polar also asks that the Commission assign LPTV-occupied channels as ATV channels if and only if there are no other technically suitable channels available for ATV broadcast by existing full-service broadcasters.[121] Polar requests that the existing service of LPTV broadcasters be protected vis-a-vis vacant full-service allotments, vacant noncommercial allotments, applicants for new NTSC permits filed after December of 1991, new NTSC or ATV allotments, and, where suitable alternative ATV channels are available, full-service broadcasters.[122] Polar also seeks a two-year competition-free application period for LPTV after the initial ATV assignments are made.[123] Polar believes that otherwise, the Commission's ATV objectives will not be met among the specialized audiences (e.g., local, minority, and isolated rural audiences) served by the low power television service.[124]

Part 74, Subpart G.

118 Second Report/Further Notice, 7 FCC Rcd at 3350-52.

119 Second Report/Further Notice, 7 FCC Rcd at 3351. See also Second Further Notice, at para. 41; MSTV Reply at 11-12.

120 Second Report/Further Notice, 7 FCC Rcd at 3352.

121 Polar Reconsideration at 6, 13.

122 Polar Reconsideration at 13. Skinner, while not petitioning for reconsideration, takes a similar position in its comments. We include Skinner's arguments for the sake of completeness. Skinner also advocates that those low power television stations with the largest populations served should be the last displaced. Skinner Comments at 11. We do not believe that this is the proper procedural context for revising our low-power television service rules and policies to make distinctions among displaced low-power television stations. Cf. Second Report/Further Notice, 7 FCC Rcd at 3351 n.118 (declining to establish displacement preference based on content).

123 Polar Reconsideration at 6.

124 Polar Reconsideration at 6.

37. We agree with MSTV that we should decline to modify our policy regarding the secondary status of LPTV as Polar requests.[125] We concur in Polar's view that ATV should be implemented as expeditiously as possible. We reiterate that low-power television service has a role in our regulatory approach to ATV.[126] As we previously stated, however, full-service stations, by definition, can reach larger audiences than the low power television service stations. It thus furthers our goals in this proceeding to permit full-service stations to take priority over the secondary services in the implementation of ATV, and we do not believe that this policy entails a comprehensive change in the secondary status of low-power television service stations.[127] As MSTV asserts, continuing low-power television service's secondary status, which requires it to yield to full-service stations, is consistent with our view that ATV is an advance in technology, not a new video service.[128] As MSTV observes, low power television service operators have been on notice since 1987 that they would be considered secondary to ATV and were subject to displacement by full-service ATV stations.[129] In addition, we observe that all meetings of the Advisory Committee and its sub-groups are open to the public. We encourage low-power television service interests to increase their participation in that body's activities.[130]

38. We also disagree that any other displacement approach than what Polar proposes would mean the loss of existing service merely to accommodate new speculative broadcast authorizations.[131] As stated in the Second Report/Further Notice, low power television service stations will continue to be permitted to operate until a displacing full-service ATV station is operational.[132] As we have previously stated, and our pending Second Further Notice bears out, it will be a challenge to provide existing full-service broadcasters sufficient ATV spectrum to satisfy their needs and the public's

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125 MSTV Reply at 13-14. We have already addressed Skinner's argument that low power television is not secondary to ATV. Second Report/Further Notice, 7 FCC Rcd at 3351; Skinner Comments at 5-6.

126 Second Report/Further Notice, 7 FCC Rcd at 3351.

127 Second Report/Further Notice, 7 FCC Rcd at 3350-52.

128 MSTV Reply at 13-14.

129 MSTV Reply at 12 n. 7. See Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, RM-5811, Mimeo No. 4074 at 2 n. 4 (released July 17, 1987).

130 This would allay the concerns of some parties, see, e.g., Polar Reconsideration 11-12, Skinner Comments at 8-9, that low-power television service interests are not adequately represented in the Advisory Committee.

131 Polar Reconsideration at 13.

132 Second Report/Further Notice, 7 FCC Rcd at 3352.

interest in the broadest and most efficient dissemination of this new transmission mode.[133] We decline to further constrain the ATV allotment/assignment process by affording low power television stations priorities not generally afforded to services with secondary status.[134] We agree with MSTV that large markets will be particularly congested; that in other markets, low-power television channels may be the ones most likely to optimize or replicate coverage of existing broadcasters; and that low-power television channels will be necessary for full-service transition to ATV. We also believe that, in rural or small markets, substitute LPTV channels are likely to be available for displaced low-power television stations.[135] We concur with the concerns of MSTV and Public Television that Polar's proposal would give low power television stations priority over vacant noncommercial allotments, contrary to our previously articulated policies.[136]

39. We also adhere to our decision not to narrow the group of potentially ready, willing, and able applicants once the initial eligibility restriction is lifted.[137] We agree with MSTV's view that Polar's request for a subsequent two-year LPTV application period would mean a change in low power television's secondary status. It would prevent existing broadcasters or new full-service applicants from applying during that time.[138] Low power

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133 Second Further Notice, at para. 41.

134 Skinner argues that the displacement of low power television broadcasters in congested markets, coupled with our decision not to consider low power displacement when making allocation decisions, is patently unreasonable and inefficient and may amount to a taking of property in violation of the Fifth Amendment. Skinner at 8-10. We disagree and find that this argument would effectively circumvent low power television's secondary status. Moreover, such regulatory action would not constitute a taking under the Fifth Amendment. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

135 MSTV Opposition at 3.

136 Second Report/Further Notice, 7 FCC Rcd at 3350; MSTV Opposition at 3-4; Public Television Opposition at 3-4.

137 Second Report/Further Notice, 7 FCC Rcd at 3344.

138 See generally MSTV Opposition at 2. We also observe that service to specialized groups, which Polar alleges are often the low power television licensee's audience, is only one of many criteria we now use in evaluating license eligibility. See generally Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 FCC Rcd 2664, 2664-66 (1992).

We also observe, in response to Skinner and Island, that Island's previous allotment proposal was considered in formulating our draft Allotment Table. Second Further Notice at para. 42 n. 49; Skinner Comments at 9-10; Island Comments at 8-9. To the extent that Island or other parties have additional suggestions, we will consider such suggestions at the time we issue

television service broadcasters may, of course, apply for ATV channels when the initial eligibility restriction is lifted. At such point, open competition will determine who the most qualified parties are. We maintain our determination not to restrict further such competition beyond our three-year initial eligibility restriction.[139]

B. Low-Power Television Service Conversion: Report and Order

40. The Second Report/Further Notice concluded that low power television services should be free to broadcast in either the ATV or NTSC mode. We also proposed to require low-power television service stations to convert to ATV at the same time that full-service broadcast stations are required to convert.[140] After reviewing the comments on this issue, we now agree with those parties who argue that such a requirement would overly burden low power stations,[141] many of which are small, community-oriented enterprises.[142] Such a requirement might, as Telemundo suggests, ultimately result in a reduction of program diversity.[143] We agree with Telemundo that we tentatively should adopt a flexible approach that permits low power television service broadcasters to convert to ATV in response to local demand. We accordingly will not mandate at this time low-power television service conversion to ATV by a certain date.[144]

VI. CONVERSION TO ATV

A. Conversion Date: Reconsideration

41. The Second Report/Further Notice put broadcasters on notice that, when ATV becomes the prevalent medium, they will be required to convert to ATV -- i.e., to surrender their reversion channel and cease broadcasting in NTSC. We also concluded that establishment of a firm date for conversion would keep administration simple, assure progress toward freeing spectrum on a timely basis, and give affected parties the benefits of a clearly defined planning horizon.[145] No parties petition for reconsideration of this aspect of our

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a proposed Final Table of Allotments.

[139] Second Report/Further Notice, 7 FCC Rcd at 3351.

[140] Second Report/Further Notice, 7 FCC Rcd at 3351-3352.

[141] Skinner Comments at 7-8; SBA Comments at 5.

[142] Telemundo Comments at 8.

[143] Telemundo Comments at 8.

[144] In light of this decision, Polar's proposal that low-power television stations be afforded primary status upon mandatory conversion to ATV is moot. Polar Reconsideration at 13-15.

[145] Second Report/Further Notice, 7 FCC Rcd at 3353.

ruling. In the interest of completeness, however, we consider parties' comments on this question.

42. While EIA/ATV Committee favors establishment of a single nationwide conversion date, as opposed to market-by-market conversion, both it and Sony urge caution in setting a firm date now. Both believe that if a date is announced now, it could disrupt the near-term NTSC receiver market.[146] We believe, however, that consumers would benefit from knowing now about the future conversion of broadcast television to ATV. They thus will have the maximum amount of time to plan their investment decisions and perform the necessary adjustments to make the transition to ATV.[147] In addition, we also agree with Fox and AT&T that setting a firm date is the most expeditious way to achieve conversion.[148] In the interest of avoiding the establishment of a premature conversion date, however, we intend to periodically review our conversion deadline before its final imposition. Thus, if particular problems occur, we may adjust the deadline accordingly, as we describe more fully below.[149]

43. SBA in its comments opposes establishment of a firm date for conversion. SBA acknowledges that "stations which have made the investment in ATV equipment" should not "tie up" limited spectrum "for an indefinite period of time." It states, however, that smaller stations cannot afford the initial investment for converting to ATV and that requiring them to convert at a definite point in the future would be unfair and unrealistic. SBA fears that equipment suppliers will enjoy an artificial market and lack incentives for reasonable pricing.[150] We have already expressed some doubts concerning this argument.[151] Moreover, a station that has not made the investment in ATV equipment, as SBA posits will be the case for smaller stations, would be more likely to "tie up" spectrum resource than one who has actually made this investment. If we extended our conversion period to accommodate stations'

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146 EIA/ATV Committee Comments at ii, 6-7; Sony Comments at 49-50.

147 Moreover, establishment of a clear plan now will enable manufacturers to anticipate any consumer disruption that might occur from lack of accurate information regarding our policies. They are thus free to take appropriate steps to inform consumers correctly, to the benefit of both the consumer electronics industry and the viewing public.

148 Fox Comments at 3; AT&T Comments at 1-3.

149 MSTV opposes establishing a timetable for conversion, referring to equipment manufacturers' comments arguing that such a schedule is premature. MSTV Reply at ii, 16, 19-20. MSTV is skeptical, though, of equipment manufacturers' objection to a firm conversion deadline, suggesting that they fear the premature obsolescence of the profitable NTSC equipment market. MSTV Reply at 20-22.

150 SBA Comments at 3-4.

151 See supra Section III.A and infra Section VI.B.

individual decisions on when to invest in ATV technology, as SBA suggests, we would have no guarantee that the conversion channel would be used for any purpose in any reasonable period of time and no guarantee that the reversion channel could be reclaimed at any given point. We agree with NTIA, rather, that a timetable for surrender of reversion channels will expedite the freeing of spectrum of significant value to other users.[152] As NTIA states, existing broadcasters will probably be awarded most of the available ATV channels. As a result, they will not face unrestrained competition from new entrants that would have a strong economic interest in speeding ATV development, thus pressuring broadcasters to keep pace. We agree with NTIA that a timetable for ATV development acts as a partial surrogate for such competition and encourages broadcasters to meet consumers' needs in a timely fashion.[153] While we thus decline SBA's suggestion that we adopt an approach to ATV implementation that permits broadcasters to plan their own conversion schedules,[154] we underscore that, as discussed below, we are building in several reviews of the ultimate conversion date to preserve flexibility in the overall conversion process.

B. Conversion Date: Preliminary Decision

44. The Second Report/Further Notice tentatively concluded that we should establish a date for conversion that is 15 years from the date that adoption of an ATV system or a final Table of ATV Allotments is effective, whichever is later.[155] Fox, Zenith and AT&T believe that this is an adequate time frame,[156] and we agree with this assessment as a preliminary matter. It appears, as AT&T suggests, that this period will allow equipment manufacturers, broadcasters and consumers sufficient time to accept conversion without significant market disruption or uncertainty.[157] For the reasons elaborated below, we disagree with Joint Broadcasters and MSTV that there is insufficient evidence to support this 15-year period.[158]

45. Available studies suggest that in 15 years stations will have

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[152] NTIA Comments at 11. Specifically, NTIA proposes the use of private market transactions and competitive bidding to permit the reclaimed spectrum to be allocated and assigned to users who can derive the greatest value from that resource. NTIA Comments at iii, 18-19. A decision on the allocation of spectrum to be reclaimed is beyond the scope of this proceeding.

[153] NTIA Comments at 11.

[154] SBA Comments at 4.

[155] Second Report/Further Notice, 7 FCC Rcd at 3353-54.

[156] Fox Comments at 3; Zenith Comments at 2; AT&T Comments at 2-3.

[157] AT&T Comments at 2-3.

[158] Joint Broadcasters Comments at 19-20 & n. 14; MSTV Reply at ii, 16-19.

implemented ATV to a degree justifying reclamation of their reversion channel. The longest typical period estimated by ISWP2 for station implementation of pass-through capability is slightly more than 3.5 years.[159] An additional 11.5 years for a station to implement whatever ATV studio production capability it deems necessary before requiring surrender of the NTSC frequency is not unreasonable.[160] This is so particularly if, as assumed in studies to date, equipment costs decline as a result of production scale and learning curve economies, and if economies result from the development of interchangeable ATV/NTSC equipment capable of replacing used NTSC equipment.[161]

46. The CBS Study considers station introduction of ATV beyond pass-through capability and on to full studio implementation.[162] As the Darby Report indicates, the CBS study projects industry implementation of full studio production capability within five to 14 years,[163] a period reasonably

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[159] ISWP2 projects the start to on-air time for a station constructing an ATV facility as ranging from a minimum of 16.5 months to a typical time of 25.5 months if a new tower is not required, and from a minimum of 22.5 months to a typical time of 42.5 months if a new tower is required. ISWP2 Fifth Interim Report at 9. "Start to on-air time" runs from the time the stations begins the implementation process to the station's going on the air with programming. Id.

[160] We impose no requirement regarding production standards or the timing of studio and production equipment conversion. See infra Section VI.F.

[161] See generally Darby Report at iv, 13, 16 (depending on assumptions of available cost studies regarding declines in equipment prices and suggesting that other economies may result should "fungible" ATV/NTSC equipment develop); CBS Study at 11-12, 15-16.

Moreover, PSWP5 has estimated that, assuming our previously articulated five-year application/construction period, in five years 150 stations will be equipped to the point of pass-through and local commercial insertion capability, serving 76 million TV households, or 83 percent of the total. PSWP5 1992 Study at 17.

[162] CBS Study at 6-7. The PBS Study considers the costs of such conversion without any assumptions or projections regarding the timing of such implementation.

[163] Darby Report at 12. Both the Darby Report and Joint Broadcasters are critical of the CBS Study and/or our use of it. The Darby Report states that the CBS Study "hypothesizes that the largest 30 stations will begin construction immediately after the necessary regulatory standards are defined and regulatory clearances are achieved, while the 640 or so smaller stations in GROUP 6 [the last group] begin five years later." Darby Report at 12. It also states that the CBS Study "assumes, without any explanation or analysis" that industry implementation will occur in 5-14 years. Darby Report at 12.

within our 15-year conversion deadline, although we are not mandating any particular ATV studio or production capability. Moreover, according to a PSWP5 preliminary report, since the CBS Study was published, a number of interim options have been investigated which may result in a 30 percent reduction in implementation costs projected in the study, and thus may encourage more rapid broadcast implementation.[164] ISWP2 also reports that there will be a sufficient quantity of programming available to implement ATV during the transition period and beyond.[165]

47. With respect to projections of ATV receiver penetration, a 1992

We disagree that the CBS study lacks explanation or analysis. The CBS Study, which, as we have noted was a preliminary one, developed "transition scenarios" upon which it based the "transition schedule" alluded to in the Second Report/Further Notice, 7 FCC Rcd at 3354 & n.156. CBS Study, supra at 5, 17. CBS is an active participant in the ATV Advisory Committee process, the CBS Study was made part of the Advisory Committee's Fourth Interim Report, and the assumptions underlying the transition scenarios it projected in 1990 are rational and informed. The CBS Study's premises include, for example, that stations in the larger markets will implement ATV first, "not unlike the introduction of color television;" that stations in larger markets will complete the transition in a shorter time than smaller market stations, "again ... similar to the introduction of color;" and that the labor cost of transition is 20 per cent of the investment in capital equipment. CBS Study at 5. It is true as Darby suggests that CBS assumes lower power requirements for ATV than for NTSC and that this assumption is still being verified. Darby Report at 13. Nevertheless, projections to date are that average ATV power is likely to be lower than for NTSC. FCC Advisory Committee on Advanced Television Service, Implementation Subcommittee Working Party 2 on Transition Scenarios, Summary of Responses to Questions for Proponents at 11 (Aug. 24, 1992) (ISWP2 Summary of Proponent Responses).

We agree with Joint Broadcasters in so far as they suggest that the CBS Study's preliminary analyses are more properly characterized as projections than findings. Joint Broadcasters Comments at 19-20 n. 14. In fact, any study of future schedules for ATV implementation would result in conclusions more properly characterized as projections rather than findings. We clarify that this is our understanding of the import of the CBS Study as cited in the Second Report/Further Notice, 7 FCC Rcd at 3354 n. 156. Regardless of the terminology employed to describe them, however, such studies, where they are conducted by experts and based on rational and informed assumptions, constitute an acceptable source of data upon which to base regulatory guidelines for ATV implementation. See generally Telocator Network of America v. FCC, 691 F. 2d 525 (D.C. Cir. 1982) (reviewing court will not require complete factual support where agency's ultimate conclusions necessarily rest on judgment and prediction). Such data will be verified or modified based on actual experience as the ATV transition unfolds.

[164] PSWP5 1992 Study at 16.

[165] ISWP2 Software Survey at 1.

PSWP5 preliminary study has developed four curves, based on high and low perceived value and high and low prices.[166] The mean values of these projections suggest a six percent penetration five years from the time that we select a transmission standard and adopt a Table of ATV Allotments, and a 37 percent penetration in year ten. PSWP5 also stated, however, that because five percent of the present TV set market is comprised of large screen sets and because this segment is growing and expected to convert quickly to ATV displays, the penetration rate may be closer to the optimistic projection (high perceived value with low price). This projection calls for an eight percent penetration in five years, and 56 percent in ten.[167] Should this optimistic projection hold true, it is not unreasonable to require ATV conversion in year 15. This is particularly so if factors such as forward pricing strategies on the part of manufacturers, not considered in the projection, come into play.[168] The availability of suitable programming, as reported by ISWP2, should also attract consumers to buy ATV receivers and thereby help increase penetration.[169]

48. We recognize that, based on a study conducted four years ago, Darby projects only 25 percent penetration 15 years after an ATV standard is

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[166] "High perceived value" refers to market perception of ATV equal to the incremental value the market affords color TV over monochrome TV, while "low perceived value" ascribes a value to ATV in the eyes of the consumer of about one third that accorded color TV. PSWP5 has projected four curves, one based on high perceived value and high prices of receivers, a second on high perceived value and low prices, a third on low perceived value and high prices, and a fourth on low perceived value and low prices. PSWP5 1992 Study at iii, 3-4, Figure 2. When full primetime programming in color was achieved in 1966, and market penetration of color sets took off, the retail price of a color TV set represented 14.7 percent of the average per capita income. The equivalent 1992 price for a similar percentage investment would be $3,700, according to PSWP5. From 1966 to 1970, market penetration for color rose from 9 percent to 34 percent, according to PSWP5. PSWP5 1992 Study at 4.

[167] PSWP5 1992 Study at iv-v. See also Results of 1992 International Summer CES On-Site Consumer Surveys (July 26, 1992) (published by PSWP5) (based on 963 exit survey responses from a total consumer attendance of 98,720, conservative analysis is that 8 percent would purchase ATV sets in five years, corresponding to 8 percent penetration in year five, the projection for high perceived value and low price).

[168] We also observe that PSWP5's figures do not consider that manufacturers may adopt "forward pricing strategies" in order to seed the market more rapidly and increase penetration. PSWP5 1992 Study at v. We understand the term "forward pricing" to refer to possible manufacturer pricing of ATV receivers lower than would normally be the practice based on costs at that initial stage of ATV development. Such "forward pricing" would be more closely aligned to what prices would be at a later stage, after economies of scale had occurred, hence the term "forward pricing".

[169] ISWP2 Software Survey at 1.

selected, rising to 50 percent three years later.[170] This underlying study, however, was completed prior to the beginning of system testing and the gathering of data on actual system performance, prior to substantial Advisory Committee input on the characteristics of the transition to ATV, and prior to the establishment of any regulatory framework for this transition. Nonetheless, should it appear at the time of our periodic reviews[171] that the Darby projections are accurate, we will not hesitate to adjust our timetable as appropriate. Our regulatory framework must of course provide for the possibility, as Darby suggests, that ATV conceivably may not be as successful as other consumer electronics innovations.[172] Our provision for periodic reviews will enable us to address this circumstance should it arise.

49. Based on the record thus far developed, we expect that the prices of ATV receivers by the end of the 15-year conversion period should be fairly comparable to NTSC set prices. Manufacturers estimate the prices of initial ATV receivers to range from 50 to 300 percent higher than their NTSC equivalents.[173] We thus agree with MSTV that projections of initial ATV receiver prices are high relative to NTSC receivers.[174] However, projections are that such prices will decline. For example, PSWP5 projects that in year ten, for a 50-inch display the high estimate of price will be $2,000 and the low estimate $900, while the high estimate in that year for a 25-inch display is $1,100 and the low estimate $450.[175] Again, should the market fail to develop so that such ATV receivers are likely to be affordable by most households by year 15, we can make the appropriate modification at our

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[170] Darby Report at vi, 29-31, Appendix C at 33-34. Darby's 1988 study based its penetration scenario on a composite of the growth patterns of several consumer product lines. Darby Report, Appendix C at 14-16.

[171] See infra Section VI.C.

[172] Darby Report at 31.

[173] Zenith Comments at 2-3 (50 to 100 percent more); EIA/ATV Committee Comments at ii, 8 (100 to 300 percent more).

[174] MSTV Reply at 18-19.

[175] PSWP5 1992 Study at Tables IV, V. PSWP5 projects initial prices of ATV receivers with a 50-inch display at a high estimate of $5,000 and at a low of $2,800. It projects initial prices for a 25-inch display, first available four years after a standard is selected an an ATV Allotment Table adopted, at a high estimate of $2,700 and at low estimate of $1,300. PSWP5 1992 Study at Tables IV, V. Zenith projects that a market for 25 to 27 inch sets, comprising 25 percent of today's market, would develop after an initial large screen rollout, followed in a few years by smaller size 19-20 inch sets, now comprising 45 percent of receiver sales. Zenith Comments at 3-4. See infra Section VI.C for discussion of 13-inch and smaller set market. EIA/ATV Committee estimates that by year 15, ATV receiver prices could drop to 20 to 50 percent above NTSC receivers of comparable size. EIA/ATV Committee Comments at 8.

periodic reviews. In this connection, it is our expectation that cable and other alternative media will contribute to the programming mix offered to ATV viewers, thereby spurring ATV penetration and exerting a downward pressure on the cost of ATV receivers by making ATV more attractive to consumers.[176] In addition, manufacturers and proponents estimate that the cost of consumer downconverters could drop to the $200 range by about the time of conversion.[177] Because the cost and availability of converters will significantly influence the implementation of ATV technology, we will also evaluate those factors during our periodic reviews of the conversion date.

50. We also believe that our conversion period will give consumers adequate time to realize the full value of their existing NTSC investment. Zenith, for example, states that purchasers of new television sets expect to get seven to 10 years of use from them, so that the majority of those purchasing NTSC receivers prior to introduction of ATV will obtain satisfactory use of their NTSC equipment.[178] Joint Broadcasters agree that 15 years will permit full use of NTSC consumer investment purchased prior to introduction of ATV. However, they argue that we fail to consider the number of NTSC receivers purchased after the introduction of ATV.[179] We note that ATV broadcasting could be introduced as early as the third year of the application/construction period[180] and that, at the end of a five-year period, as many as 76 million TV households could be receiving ATV service over the

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[176] Sony believes that consumers will only invest in ATV receivers if more than one delivery media, e.g., cable, DBS, VCRs, is also available on them. Sony Comments at 37. In this regard, PSWP5 projects that it is possible that ATV cable service may be inaugurated in some major metropolitan areas shortly after selection of a terrestrial transmission standard and when display units are available. PSWP5 1992 Study at 9. But see Darby Report at 38 (variety of constraints on the incentive and ability of cable industry to implement ATV capability). PSWP5 also believes that DBS households will help increase ATV penetration. PSWP5 1992 Study at 13. See also Darby Report at 42 (ATV may provide marketing tool for DBS to differentiate its service from cable).

[177] Zenith Comments at 2,5 (projecting initial prices at about $500, falling by half over time); EIA/ATV Committee Comments at 8-9 (initial downconverters may cost $500 to $1,500 or more, falling to $100 or $300 after 15 years); AT&T Comments at 4 (cost of downconverters could fall to $200 by the end of the 15-year conversion period). GI states that the electronics cost of downconversion, while not insignificant, will not be major compared to other parts of an ATV receiver. GI Comments at 6-7.

[178] Zenith Comments at 2.

[179] Joint Broadcasters Comments at 20.

[180] ISWP2 Fifth Interim Report at 9-10 (using "typical" times; less conservative "minimum" times are even shorter).

air.[181] We note that NTSC receivers purchased during that period would still "live out" consumer expectations of a seven-to-ten-year life span before conversion at the 15-year mark. Furthermore, based on these assumptions, we believe it reasonable to expect that a large number of consumers will be aware relatively early in the transition period of the regulatory framework governing ATV. In addition, it is possible, as Sony suggests, that non-broadcast uses of NTSC will continue to give value to consumer NTSC equipment even after conversion to ATV.[182]

51. Contrary to the views of several parties,[183] professional equipment suppliers or their representatives estimate that costs for ATV transmitting equipment and antennas will be fairly comparable to NTSC.[184] EIA/ATV Committee believes that ATV transmitters will be available about one year after approval of an ATV standard, and that they will cost about 10 percent more than their NTSC counterparts.[185] ISWP2 projects that, with appropriate planning on the part of broadcasters, sufficient numbers of transmitters and antennas should be available.[186] EIA/ATV Committee states that the CBS and PBS studies on costs of studio conversion are now being refined by the Advisory Committee.[187] There are estimates that a full ATV capability (transmission, studio and production) installed over a five-to-nine year period will cost less than $12 million for a station in one of the top ten markets and about half that for the very smallest station.[188] Net investment may be even less, depending on the interchangeability of ATV and

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181 PSWP5 1992 Study at 17.

182 Sony Comments at 46-48.

183 Joint Broadcasters Comments at 19; SBA Comments at 3-4.

184 EIA/ATV Committee Comments at 9. Micro, an antenna manufacturer, states in its comments that a type of antenna that it has been supplying to the international market in quantities of 3,000 to 5,000 a year, an "all band antenna," could accommodate NTSC and ATV signals at the same time. Micro states that there should be no problem in meeting the industry's antenna requirements. Micro Comments at 1-2.

185 EIA/ATV Committee Comments at 9. We recognize, as Darby suggests, that a complete assessment of the costs of transmission has yet to be performed. Darby Report at 6. See supra note 46.

186 ISWP2 Transmitter and Antenna Manufacturer Survey at 1, 6.

187 EIA/ATV Committee Comments at 10.

188 Darby Report at 19. Darby states that the cost for a network affiliate to upgrade plant to permit network pass through is likely to be about $1.5 million for a large station and about half that for the very smallest, assuming that the latter is permitted to implement ATV at a significantly later date. Darby Report at 19.

NTSC equipment and the timing of the retiring of NTSC equipment.[189] We are not, however, mandating that broadcasters convert studio and production capacity to ATV by any deadline.[190] Moreover, given these projections, broadcasters desiring to have an ATV studio and production facility in place by the time of conversion will have the full 15-year period to equip such a facility.[191]

52. On the basis of the foregoing and as MSTV suggests,[192] we cannot accept LMCC's position that 15 years is too long a period of time for conversion.[193] We have already stated that we will permit the voluntary surrender of an NTSC channel prior to conversion by a broadcaster awarded a corresponding ATV channel on a case-by-case basis, considering in particular whether ATV receiver penetration in the affected community demonstrates that consumers will not be prematurely deprived of the use of their NTSC receivers.[194] We thus have already provided for prompt recapture of spectrum in those cases where the ATV transition occurs ahead of our projected schedule.

C. Periodic Reviews: Preliminary Decision

53. We believe that a 15-year conversion period is reasonably supported by the data now available, and we adopt this period as a preliminary matter. We recognize, however, that the data upon which we rely consists largely of projections that are subject to change as more information regarding ATV is obtained. For example, as Sony observes, we do not yet know whether a direct view display technology that can be cost-effectively mass produced will be developed in the near future.[195] We also are determined to avoid making an inflexible decision that may be overtaken by future

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189 Darby Report at 19.

190 As explained supra Section III, broadcasters are only required to transmit programming in the ATV format. They may continue to broadcast upconverted NTSC programming, for example.

191 As Darby states, the financial burden of ATV investment may be lessened by spreading out associated expenditures. Darby Report at 25. Our refraining from requiring any mandatory level of ATV production capacity by the conversion date permits stations to spread out the considerable costs of studio and production conversion as the market dictates. As stated above, broadcasters need only be transmitting an ATV signal, which may be largely satisfied by pass-through capability, to meet our six-year application/construction deadline. See supra Section III.

192 MSTV Reply at 9-10.

193 LMCC Comments at 5.

194 Second Report/Further Notice, 7 FCC Rcd at 3344.

195 Sony Comments at 28-29.

events.[196] We thus adopt a schedule of periodic reviews of our conversion deadline. Doing so will also enable us to address any special issues that may arise concerning the very small (13-inch and under) receiver market[197] and issues relating to consumer investment in second NTSC receivers.[198]

54. Most commenters agree with our proposal to review, at the close of the application/construction period, the propriety of any conversion date we establish.[199] While we tentatively had established 1998 as this date, this date has now become 1999 with the preliminary modifications we make herein to our application/construction period. Commenters recognize, as do we, that our preliminary scheduling of a conversion date is based on our best projections of the progress of ATV implementation.[200] A 1999 review will better allow us to determine whether the informed but necessarily preliminary judgments we make now comport with marketplace developments as the process continues.[201] Although we do not believe that 1999 is too soon to make an interim assessment of the suitability our 15-year conversion date, we do agree with NTIA's recommendation that we seek additional periodic information updates and review ATV progress to adjust, if necessary, the timetable

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196 Joint Broadcasters Comments at 20; MSTV Reply at 14, 16, 20. Sony Comments at 11, 30-31 (because of the wide range of factors that may impact consumer behavior, including consumer perception of the difference between ATV and NTSC, availability of ATV programming, and diversity of ATV delivery media, it is not yet possible to define precisely the likely ATV transition scenario).

197 Sony Comments at 46, 53-54 (suggesting possible problems with portable small-screen receiver conversion, as small-screen sets may not realize the full benefits of the advanced technology and, being often put to portable use, must be fed over-the-air). But cf. Zenith Comments at 3-4 (rollout of 19-20 inch ATV sets expected after market for large screen and 25-to-27-inch sets develops).

198 Specifically, we are concerned with protecting consumer investment in second or third NTSC sets after a primary ATV set is purchased. Possible solutions include equipping NTSC sets with downconverters or equipping an ATV set with a downconverter and an external downconverting feed for "neighboring" NTSC receivers. See generally Sony Comments at 39-40. We expect the nature and extent of this problem to become clear as the conversion process moves forward, and we wish to retain the flexibility to take appropriate action.

199 Joint Broadcaster Comments at iii, 20; Fox Comments at 3, 8; Zenith Comments at 4; EIA/ATV Committee Comments at ii, 7.

200 See, e.g., Zenith Comments at 4 (suggesting that ATV implementation conceivably may not proceed as swiftly as we now envision).

201 See, e.g., Fox Comments at 8.

adopted.[202] We also agree with NTIA that we should establish these reviews prior to key points, such as the imposition of the 100 percent simulcasting requirement and the final deadline for returning one simulcast channel.[203] We accordingly adopt the following schedule for periodic review of information relating to the conversion deadline:

1. 1999, at the close of the application/construction period.[204]
2. 2002, prior to implementation of the 100 percent simulcast requirement.[205]
3. 2008, prior to full conversion to ATV.[206]

We believe that these reviews will permit us to monitor the progress of ATV implementation and to make any necessary adjustments promptly.[207] We also agree with AT&T that the conversion schedule should not be modified without a substantial showing that the change is in the public interest.[208]

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202 NTIA Comments at ii, 4, 14. Cf. Sony Comments at 54-55 (arguing for reviews later in time than 1998, keyed to penetration rates); AT&T Reply at 1 (implementation schedule can be adopted, if necessary, at an appropriate mid-point in the development of ATV in light of actual experience).

203 NTIA Comments at ii, 4, 14.

204 We will also review our temporary suspension of the dual network rule at this time. See supra Section IIC.

205 At the 1999 and 2002 reviews, we will also review our regulatory approach to simulcasting. See infra Section VII.A.

206 We will also review our policy regarding suspension of the dual network rule at these times.

207 Sony recommends a review at one percent penetration, and again at ten per cent, stressing that this will clearly identify the rate of "take off" of ATV and permit the more sensible prediction of an ATV conversion date. Sony Comments at 54-55. We believe that the dates we establish adequately satisfy Sony's underlying concerns. PSWP5, for example, under all of its scenarios (high/low value, high/low pricing) projects achievement of one percent or greater penetration by year six, the date of our 1999 review, and ten percent or greater penetration by year nine, the date of our 2002 review. PSWP5 1992 Study at Figure 2. Darby projects one per cent penetration by 2003, a year in which we have scheduled a review, and over 10 per cent (in fact, 25 per cent) penetration by 2008. Darby Report at 29. We also stress that the purpose of these reviews is to permit us to make adjustments as necessary. Based on all relevant factors, including penetration, should we find that we also must adjust the times for review, we will do so. Beyond the foregoing, we decline to base the conversion schedule or the review calendar more directly on receiver penetration levels.

208 AT&T Comments at 3.

D. Election: Reconsideration/Report and Order

55. We do not agree with those parties who contend that we should depart significantly from our overall conversion plan by allowing broadcasters a virtually indeterminate period in which to choose whether and when to convert to ATV.[209] GHI and Brechner, for example, both argue that stations that have not converted to ATV by the established date should be allowed to broadcast in NTSC and convert their NTSC channel on a voluntary basis at a later date. GHI specifically states that licensees should be permitted to broadcast in NTSC until they are economically able to convert and should suffer no sanction beyond the requirement that they surrender the second channel at the point of conversion.[210] NTIA, while strongly supporting our decision to require broadcasters to give up one of their two channel assignments by a specific deadline, disagrees with our proposal to require that all broadcasters utilize the remaining channel only for ATV service. NTIA argues that broadcasters should be allowed to offer either ATV or NTSC service, and to surrender the corresponding unwanted channel, in a particular market, at any time, up to and including an "election" deadline which could be set at 15 years.[211]

56. We reiterate that we are awarding broadcasters interim use of an additional 6 MHz channel to permit a smooth, efficient transition to an improved technology with as much certainty and as little inconvenience to the public and the industry as possible. We clarify that, in general, broadcasters who do not convert to ATV will nevertheless have to cease

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209 GHI Reconsideration Comments at 6; Brechner Comments at 5; NTIA Comments at ii-iii, 4, 15-17.

210 GHI Reconsideration Comments at 6. GHI proposes that an ATV allotment remain paired with the NTSC channel during the entire 15-year conversion period to eliminate the risk of applicants going to the trouble and expense of resolving all their construction problems only to have lost their ATV assignment.

GHI's assertions that this Commission may not revoke a license for failure to convert to a new technology, and that it may not consider the technical quality of the service provided as an element of renewal expectancy, are without merit. GHI Reconsideration Comments at 6. Contrary to GHI's assertions, this Commission has ample authority to require adherence to the technical standards it sets for television broadcast. 47 U.S.C. §§ 303(a), (b), (e), (f), 308, 309, 312 (a).

211 Under NTIA's proposal, broadcasters would be required to give back one of the two channels at the "election" deadline. NTIA Comments at ii-iii, 4-5. See also FIT Reply at 2; MSTV Reply at 20-22. Cf. Sony Comments at 31 (ATV service will vie with new multichannel, near video-on-demand, digital NTSC services for consumer attention and acceptance).

broadcasting in NTSC at the final conversion date.[212] Based on the projections cited above about the United States television market's likely acceptance of ATV over the conversion period, we see no reason to award an additional 6 MHz of spectrum to broadcasters who do not wish to convert to ATV, and who do not demonstrate such motivation by constructing an ATV facility within the required time. We are also concerned that such an "election" approach in the long run would impede the use of existing NTSC spectrum for services that the Commission ultimately deems to be in the public interest.[213] Moreover, all of our existing data indicates that consumer acceptance of ATV by the point of conversion should be sufficiently widespread that broadcasting exclusively in ATV will be economically attractive and that continued broadcasting in NTSC will be economically unattractive. We also expect that eliminating the need for both ATV and NTSC equipment will prove more convenient and less confusing to consumers. Moreover, our periodic reviews will take the extent of consumer acceptance into account before ratifying the important determination to eliminate NTSC broadcasting.

57. On the other hand, should our periodic reviews demonstrate that the conversion date should be generally advanced, we will consider accelerating the deadline during these reviews. In addition, should these reviews show that it will further the public interest to permit particular broadcasters to cease broadcasting in NTSC prior to the date set for full conversion, we will consider doing so.

E. Future Technological Advances: Reconsideration/Further Notice

58. Fox asks that this Commission remain open to the use of the conversion channel for digital compression techniques that may be developed in the future for ATV. Fox gives as an example digital compression of multiple ATV images on a single 6 MHz channel. Fox believes that should such an innovation ever be developed, it would place broadcasters on a more even footing with their multi-channel competitors.[214]

59. As we have indicated previously in this proceeding, one of our goals is to ensure that the ATV technical standard is sufficiently flexible to allow it to incorporate future advances in technology. Such advances could include

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[212] NTIA asks that we clarify this point. NTIA Comments at 15 n. 25. We reiterate, of course, that because ATV conversion requires that NTSC broadcast service cease, we are building in as much flexibility into the conversion timetable as possible and as would be consistent with our goal of making the transition prompt, smooth and certain.

[213] NTIA proposes that we initiate a rulemaking to determine how best to create large national or regional blocks of vacant radio spectrum and how to treat NTSC broadcasters that continue to occupy channels within blocks of spectrum that may have been largely vacated in order to achieve spectrum efficiency. NTIA Comments at iii, 18. We wish to avoid such significant implementation hurdles in the first place, however.

[214] Fox Comments at 13 n. 5.

improvements in ATV audio and video techniques, such as those mentioned by Fox, and interoperability with other video media, such as high resolution computer displays. We therefore intend to consider authorization of other advanced video applications, including future techniques that might provide for transmission of more than one ATV program service on a single conversion channel, so long as they are compatible with the ATV system we select. Such a development would be of potentially great significance to broadcasters' ability to compete in a multichannel environment. We note that a multi-camera ATV system might also be used to allow viewers to select from multiple channel angles or to provide them with interactive applications. We request comment on the possible operation of such advanced technologies on the ATV conversion channels.

F. Production Standard: Report and Order

60. Sony advocates that the United States adopt a single production standard, specifically, the SMPTE 240M-1125/60 production standard and the SMPTE 260M digital production standard. It cites this standard's acceptance as a "de facto HDTV production standard -- worldwide -- in multiple market niches."[215] Sony estimates that use of such a single worldwide standard will achieve considerable economies, and that cameras using different single-nation standards would cost considerably more.[216] AT&T and Zenith disagree. AT&T argues that the SMPTE 240M and 260M standards are not equally compatible with all of the ATV proponent systems and asserts, further, that the industry will need several levels of performance formats, rather than a single standard, to meet our goals of routineness and affordability for conversions among production formats.[217] Zenith argues that studio equipment manufacturers will not commit to build equipment until a U.S. transmission standard is adopted, making the adoption of a production standard now premature.[218]

61. We note, as Sony acknowledges, that SMPTE is still in the process of adopting several ATV production standards.[219] SMPTE is also a member of

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215 Sony Comments at i, 5, 12. See also MPAA Comments at 9 (discussion of the benefits of a worldwide standard).

216 Sony Comments at 23.

217 AT&T Reply at 5-6.

218 Zenith Reply at 2-9.

219 Draft Proposed SMPTE Standard for Composite Analog Video Signal Widescreen NTSC T14.39-02/Rev. 5.0 (August 7, 1991) (private committee document -- not for publication); Draft Proposed SMPTE Standard for Television Signal Parameters 1050/59.94/2:1 and 525/59.94/1:1 Advanced Television Production Systems, T14.391/Rev. 4.2 (Sept. 6, 1991) (private committee document -- not for publication); Draft Proposed SMPTE Standard for Television Signal Parameters 787.5/59.94/1:1 and 1575/59.94/2:1 Advanced Television Production Systems, T14.392/Rev. 4.1 (Sept. 6, 1991) (private committee document -- not for publication). See also SMPTE Standard for Television-

ATSC and has been designated by that organization to develop studio/production technical specifications once an ATV system is adopted.[220] Historically, the FCC has not set broadcast production standards. We agree with AT&T that we should not intervene in the industry's traditional role of formulating production standards.[221] Such intervention would be particularly unwise in this case, where industry standards-setting bodies are actively engaged in and organized specifically for addressing this question. Accordingly, we are not proposing to adopt a production standard for broadcast ATV service.

G. Noncommercial Television Waiver: Reconsideration

62. In its reconsideration petition, Public Television requests waivers of our conversion policy for applicants proposing to build both NTSC/ATV facilities in an area unserved by a noncommercial station, if ATV penetration is insufficient to allow ATV-only operation.[222] We find such a request premature. We also observe that should such cases arise, we can address them individually or at the time of our periodic reviews.

VII. SIMULCASTING

A. Timetable for 100 Percent Simulcasting: Reconsideration/Preliminary Decision

63. The Second Report/Further Notice concluded that we should require 100 percent simulcasting of the programming on the ATV channel at the earliest appropriate point. We noted that such a requirement would help ensure that consumers are not prematurely deprived of the benefits of existing television receivers and other devices.[223] We stressed that the ATV channel is not a permanent grant of two 6-MHz channels to existing broadcasters, but rather is intended to facilitate the transition to full ATV service.[224]

64. We now conclude as a preliminary matter that we should impose a 50 percent simulcasting requirement one year after the six-year application/construction period ends. We also decide preliminarily to apply a

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Signal Parameters -- 1125/60 High-Definition Production System, SMPTE 240M-1988 (approved Mar. 14, 1988); Proposed SMPTE Standard for Television -- Digital Representation and Bit-Parallel Interface -- 1125/60 High-Definition Production System, SMPTE 260M (published for comment only); Sony Comments at 5.

220 ATSC Comments, Annex I at 2-3.

221 AT&T Reply at 6.

222 Public Television Reconsideration at 17-18 n.18.

223 Second Report/Further Notice, 7 FCC Rcd at 3355.

224 Second Report/Further Notice, 7 FCC Rcd at 3355-6.

100 percent simulcasting requirement two years thereafter, i.e., three years after the six-year application/construction period ends and nine years after ATV implementation begins.[225] However, we will review this schedule both at the time of our initial review of conversion, in 1999, and immediately prior to imposition of 100 percent simulcasting, in 2002. As we stated in the Second Report/Further Notice, at the point that we impose a 100 percent simulcasting requirement (at the nine-year mark) ATV should be established, and the need to afford broadcasters some flexibility in starting up ATV operations and to cope with the new technical issues simulcasting will raise, will have diminished. At the same time, ATV receiver penetration, and hence revenues from ATV programming, should be increasing.[226] With the ascension of ATV service, the need to protect remaining NTSC viewers, provide for a smooth transition to ATV, and ensure surrender of the reversion channel will increase.[227] Imposition of 100 percent simulcasting at this juncture will protect consumer investment in NTSC, while at the same time promoting ATV implementation[228] and ensuring spectrum efficiency.[229] We recognize, however, the concerns of certain parties that our ability to impose simulcasting and ultimately to reclaim the reversion channel not be impeded by broadcaster reluctance to shift from complete programming flexibility to 100 percent simulcasting nine years after the ATV implementation begins.[230] We thus believe that to ensure as smooth a transition to full simulcasting as possible for both broadcasters and viewers, we should phase in this requirement. Accordingly, we will require 50 percent simulcasting[231] in year seven, one year after the application/construction period closes. This 50 percent requirement will continue to offer broadcasters some flexibility, including the flexibility to cope with technical issues raised by a complete

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225 Second Report/Further Notice, 7 FCC Rcd at 3356-57.

226 Second Report/Further Notice, 7 FCC Rcd at 3356. For example, the PSWP5 1992 Study at iv projects that the mean value of four different penetration scenarios results in 37 percent penetration 10 years after ATV standard/Allotment Table is effective. We believe that it would be advisable to impose a complete simulcasting requirement somewhat prior to such point, i.e., -- at the nine-year mark.

227 Second Report/Further Notice, 7 FCC Rcd at 3356.

228 AT&T Comments at 4.

229 Second Report/Further Notice, 7 FCC Rcd at 3356. See also NTIA Comments at 13.

230 See, e.g., NCTA Comments at 4.

231 As discussed infra Section VII.B, we define simulcasting as the broadcast, on the NTSC channel, of the same underlying program as broadcast on the ATV channel, without also requiring the converse, that programs broadcast on the NTSC channel be broadcast on the ATV channel. We thus require broadcasters to simulcast 50 percent of each day's ATV programming on their NTSC channel at the seven-year mark.

simulcasting requirement, as they implement full ATV capabilities. It would also, however, prompt preparation for full conversion by ensuring that broadcasters do not use the conversion channel to develop a second programming service.[232] This staggered approach also intensifies the simulcasting requirement as ATV implementation progresses, ATV receiver penetration increases,[233] and a corresponding need to protect consumer investment in NTSC equipment begins to develop.

65. Our approach also will afford broadcasters seven years of initial flexibility to explore the creative potential of the ATV mode and to attract viewers to ATV, as most commenters argue is needed.[234] As NTIA suggests, the viability of ATV may hinge on consumers' ability to differentiate ATV from NTSC programming. Thus, broadcasters and program producers should be afforded sufficient time and flexibility to establish, as a technical matter, a distinctive ATV format in the marketplace.[235] Such distinction may be necessary, as Sony suggests, to enable broadcasters to compete with radically enhanced NTSC services such as video-on-demand.[236] According to Sony, consumers will only purchase ATV receivers in the volume necessary to have a significant impact on costs when sufficient ATV programming is available.[237] Thus, initial flexibility may be critical to the rapid development and ultimate success of ATV, to encourage broadcasters to air programming uniquely suited to the technical capabilities of the ATV mode. Moreover, as Fox states, broadcasters must be able to attract viewers to their ATV channel, and thus realize revenues from that facility, in order to fund their initial investment in the technology.[238]

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232 Second Report/Further Notice, 7 FCC Rcd at 3357.

233 See generally PSWP5 1992 Study at iv (mean values of four different curves of ATV market penetration project six percent penetration five years after the ATV standard/Allotment Table becomes effective, rising to 37 percent in year ten).

234 Fox Comments at 11-12; EIA/ATV Committee Comments at ii, 10.

235 NTIA Comments at 13.

236 Sony Comments at 7, 34-36. Cf. NAB Reply at 4 (enhanced resolution may not be sufficient to attract viewers to ATV; program diversity may also be needed); MSTV Reply at 23 (rigid requirements will handicap broadcasters in competing with cable, VCRs and DBS).

237 Sony Comments at 7.

238 Fox Comments at 5, 12-13. Although it is true, as NCTA states, see NCTA Comments at 12, that the spectrum is provided for broadcasters' use without a fee, they nevertheless have committed, through the Advanced Television Test Center, considerable sums in developing ATV technology, and will have to make significant investments to obtain ATV station capability. We of course expect that other media will participate in the transition to ATV, and recognize the investment that some of these alternative media have

66. In any case, initial flexibility also may be necessary from a purely technical point of view. As MPAA states, some programming produced for NTSC receivers may not be convertible to ATV, which has a different aspect ratio. Other NTSC programming, which may have been on film (in the wide-aspect required for ATV), may still require technical preparation to be received in ATV. Conversely, there may be particular difficulties associated with converting ATV programming (which has a wide, 16:9 aspect ratio) to NTSC (which has a 4:3 aspect ratio) without distortions. According to MPAA, programming produced specifically for ATV receivers would require considerable technical adaptation for NTSC reception.[239] Sony argues that broadcasters must learn new shooting techniques in order to permit downconversion of ATV programming to an acceptable NTSC picture.[240] In addition, contrary to NCTA's position,[241] given the low penetration rates likely to characterize initial ATV implementation,[242] it is unlikely that broadcasters will favor ATV over NTSC programming, to the detriment of NTSC viewers without ATV receivers.[243]

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already made in the development of ATV.

We also do not agree with NCTA that, if broadcasters are unable to accomplish the transition to ATV without some relief from complete and immediate simulcasting, we should open initial eligibility up to others. NCTA Comments at 13. We have previously found that existing broadcasters are the group most likely to implement ATV quickly. Second Report/Further Notice, 7 FCC Rcd at 3343. Moreover, opening up initial eligibility would make it more difficult, if not impossible, to phase in a simulcasting requirement and thus would make the transition to ATV more difficult for viewers.

239 MPAA Comments at 4. MPAA states that the technical changes required for adaptation of ATV programming for NTSC transmission are similar to the technical changes necessary now for presentation on NTSC aspect-ratio channels of programs produced with wide-aspect ratios, as is the case with most theatrical motion pictures. To eliminate the distortion which such "downconversion" would cause requires considerable technical preparation, according to MPAA. MPAA states that conversely some NTSC programming would not be convertible at all to ATV, while other NTSC programming would require considerable technical preparation. MPAA Comments at 4.

240 Sony Comments at 42-45.

241 NCTA Comments at 4, 10-12; NCTA Reply at 1-3.

242 See supra Section VI.B and infra note 256.

243 See, e.g., NAB Reply at 9. Fox also observes that initial ATV receiver purchasers will likely retain their NTSC sets as well and that all ATV receivers will probably also be able to receive NTSC signals, so that early ATV receiver owners will continue to receive both NTSC and ATV. Fox Comments at 9. See also Zenith Comments at 5; Sony Comments at 48-49; NAB Reply at 5 (initial ATV receivers likely to be dual (ATV-NTSC) mode). Fox states that such TV households would be better served by more diverse, as

67. We are not imposing a 100 percent simulcasting requirement from the outset, as some parties urge.[244] NCTA is concerned about our ability to reclaim the reversion channel under the simulcasting regime we establish.[245] As NAB states, we have ensured that ATV is a replacement service.[246] We reiterate that we will reclaim the reversion channel at the conversion date, i.e., 15 years from the time an ATV Allotment Table/standard is effective. Indeed, one of our purposes in setting a simulcast timetable now is to prepare broadcasters for such an eventuality. We do not believe that, as a policy matter, permitting broadcasters initial complete flexibility for one year after the application/construction period closes, at which point we will begin to phase in a simulcast requirement, will result in the creation of a permanent separate programming service on the ATV channel.[247] Indeed, assuming that the technical difficulties discussed just above can be overcome, there is evidence that programming on the ATV channel may initially consist largely of material upconverted from the NTSC format.[248] We also do not believe that Ashbacker and its progeny[249] require a more rigorous simulcasting regime, as NCTA contends.[250] As NAB and MSTV argue, we have the authority to

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opposed to simulcast, programs. Fox Comments at 9.

In addition, Sony suggests that NTSC investment will continue to be used by alternative multichannel media offering new innovations in NTSC, such as multichannel NTSC. Sony Comments at 46-49.

244 See, e.g., NCTA Comments at 9-16.

245 NCTA Comments at 4.

246 NAB Reply at 6-7.

247 NCTA Comments at 4. As discussed infra note 280, we have few restrictions on the program content which may properly be aired on the television service pursuant to Part 73, Subparts E and H of our Rules, 47 C.F.R. Part 73, Subparts E and H. We thus do not believe that permitting non-simulcast programming on the ATV channel necessarily makes it something other than television service transmitted in the ATV format.

248 See, e.g., NAB Reply at 3.

249 Ashbacker Radio Corp. v. FCC, supra, 326 U.S. 327; United States v. Storer Broadcasting Co., supra, 351 U.S. 192 (hearing requirement of 47 U.S.C. § 309 does not limit the Commission's power to promulgate rules setting license eligibility criteria).

250 NCTA Comments at 4-5, 14-16; NCTA Reply at 3-4, 7-10. Contrary to NCTA's claim, we do not believe that our rules prohibiting FM translators from local origination are apposite. Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations, 5 FCC Rcd 7212 (1990). FM translators are licensed as a secondary service intended to supplement the service of primary stations. The ATV conversion channel is an interim grant

establish threshold qualifications before an applicant is entitled to comparative consideration.[251] Allowing some initial flexibility regarding programming fosters expeditious development of ATV and thus strengthens our reasons for restricting eligibility to existing broadcasters as an initial matter.[252] We agree with MSTV that it may be that only by having such initial flexibility will a broadcaster be able to develop a competitive ATV service.[253] We also agree with MSTV that permitting initial flexibility will not disenfranchise NTSC viewers.[254] As a practical matter, because initial ATV receiver penetration is expected to be low, it is unlikely that significant numbers of viewers will have come to rely on any separately programmed material on the ATV channel by the time we begin to impose a simulcasting requirement.[255] Should ATV penetration be higher than initially projected, we can make the appropriate adjustment in our 1999 review.[256] We thus disagree with NCTA that the interim, transitional nature of the conversion channel requires 100 percent simulcasting from the outset.[257]

68. On the other hand, we also decline NAB's request that we permit broadcasters ultimately some flexibility to program without limit in response to viewer demand, as opposed to implementing a 100 percent simulcasting

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of spectrum intended, at the conversion date, to substitute for the NTSC channel as a primary service.

[251] NAB Reply at 6-7; MSTV Reply at 24-25; United States v. Storer Broadcasting Co., 351 U.S. 192.

[252] See also NAB Reply at 6-7.

[253] MSTV Reply at 24-25.

[254] MSTV Reply at 24-25.

[255] See also discussion of ATV receiver penetration supra Section VI.B. See also MSTV Reply at 24-25.

[256] ATV receiver penetration prior to 1999, before existing broadcasters are required to be on the air, has been projected at from less than one percent to about 13 per cent. Compare Darby Report at 29 (less than one per cent) with PSWP5 1992 Study, Figure 2 (about 13 percent using High Perceived Value-Low Price curve). Thus, we do not expect that any adjustment to the simulcast deadline will be necessary prior to this point, at which time we can also take account of other relevant factors such as the development of downconverters for home use on NTSC receivers and the development of necessary professional equipment. Moreover, we can better evaluate this preliminary decision at the review of the application/construction times we are scheduling at the point an ATV standard/Allotment Table is effective.

[257] NCTA Comments at 7-13. Additional arguments which NCTA raises regarding carriage of ATV signals are beyond the scope of this proceeding. NCTA Comments at 7.

requirement.[258] We understand broadcasters' need to develop additional revenues to help defray the investment necessary to implement ATV.[259] Our broad definition of simulcasting permits such development. However, receipt of additional revenues from this second channel, like use of the channel itself, is transitional only, terminating at the point of conversion. NAB correctly states that simulcasting serves the public interest at the "tail end of the conversion process" by protecting the relatively smaller NTSC audiences that we expect will exist vis-a-vis ATV viewers at that time.[260] We intend to ensure that the path to the final conversion to ATV is as direct and unaffected by collateral factors as possible. To do so, we must adopt measures that ensure that, as the ATV transition progresses, broadcasters do not disproportionately rely on revenues from their second channel, that significant numbers of viewers do not come to expect a second channel of completely differentiated programming, and that the increasingly smaller number of NTSC-only viewers are not abruptly disenfranchised. We therefore decline to reconsider our determination that a 100 percent simulcasting requirement should ultimately be applied.

69. We also do not agree with those who would defer any decision on a simulcasting requirement.[261] Broadcasters, manufacturers, programmers and consumers need a clear planning horizon to make the transition to full ATV broadcasting smoothly and with minimal financial disruption. The preliminary timetable we establish, together with our provision for its review, should alleviate parties' concerns that our schedule will hinder broadcaster flexibility and effective development of ATV.[262] This schedule permits broadcasters to adjust gradually to the new demands of this technology and develop ATV markets accordingly, without threatening NTSC service.[263] We thus adequately accommodate NAB's concern that we afford broadcasters' sufficient flexibility to finance and attract viewers to the second ATV channel, while at the same time fulfilling our objectives of protecting NTSC viewers, assuring spectrum efficiency and accomplishing a smooth technological

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[258] NAB Reconsideration at 3-4 n. 3; NAB Reply at 1-2. Cf. Golden Orange Comments at 5-6 (concluding that general simulcast requirement is neither practicable nor advisable).

[259] NAB Reconsideration at 3-4 n. 3.

[260] NAB Reconsideration at 3-4 n. 3. But see NAB Reply at 4-5.

[261] See, e.g., Joint Broadcaster Comments at 21-22; Fox Comments at 3; MSTV Reply at ii, 16; EIA/ATV Committee Comments at 10 (arguing for deferral until our review of conversion date); NAB Reply at 1-2 (defer any decision, if at all, until the end of the transition period). Cf. ATSC Further Comments at 2 (supporting Joint Broadcasters); MPAA Comments at 7 (arguing in alternative).

[262] NAB Reply at 2,4; Joint Broadcaster Comments at 21-22; Fox Comments at 11-12, 17; EIA/ATV Committee Comments at 10; MSTV Reply at 23.

[263] NAB Reply at 2; Fox Comments at 9, 16.

transition.[264] We also believe that our regulatory approach is sufficiently flexible that it is unnecessary to afford special relief to classes of stations that may be at a competitive disadvantage, as Golden Orange suggests.[265]

70. It is true, as some suggest,[266] that our two-stage implementation would offer less flexibility during the introductory period of ATV than if we only imposed a simulcasting requirement at the nine-year mark. We believe that phase in of the requirement, however, will begin to accustom both broadcasters and viewers to simulcasting, and thus make the ultimate transition to full simulcasting easier. We therefore agree with those who advocate such a phased-in approach.[267]

71. Our periodic reviews will permit us to calibrate our regulatory requirements to marketplace conditions as they develop.[268] In those reviews, we can take account of the development of consumer downconverters and other

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264 NAB Reply at 1-2.

265 Golden Orange Comments at 5-6.

266 NTIA Comments at 13 n.22. See Second Report/Further Notice, 7 FCC Rcd at 3356-57.

267 Grass Valley Comments at 2. Given the point at which we are imposing 100 percent simulcasting, nine years after an ATV standard/Allotment Table is effective, we do not believe a more gradual phase in than we alternatively proposed is necessary. See generally MPAA Comments at 7. We note in this regard that the dates for 50 percent and 100 percent simulcasting remain as we proposed in the Second Report/Further Notice, seven years and nine years, respectively, from the onset of ATV implementation. 7 FCC Rcd at 3357.

We also believe that the simulcast regime we adopt is sensitive to the First Amendment concerns which parties such as Fox raise. Fox Comments at 10. We are refraining from imposing any simulcast requirement for seven years after ATV implementation begins, and then will only impose a 50 percent simulcasting requirement after a prior review confirms that this remains appropriate. We will then impose a full simulcasting requirement nine years after ATV implementation starts, again only after we have had the benefit of another review. We believe that these presumptive deadlines and this schedule for review provide adequate opportunity for any necessary adjustments. We also are affording broadcasters considerable latitude regarding content and scheduling of simulcast programs through the flexible definition of simulcasting we adopt. See infra this Section. We believe that we may, consistent with the Constitution, condition access to the conversion channel on compliance with the simulcast regime we adopt.

268 NAB Reply at 2.

similar alternatives to purchase of new receivers,[269] ATV set penetration and cost, ATV programming, and audience share and ratings. We believe that reviews at the close of the application/construction period, in 1999, and again in 2002, prior to imposition of one hundred percent simulcasting, will provide us with significant additional evidence on these questions, while giving broadcasters renewed notice of what their simulcasting obligations will be.[270] We will modify our simulcast timetable only upon a substantial showing that such change furthers the public interest.

B. Definition of Simulcasting: Preliminary Decision

72. For the reasons given below, we define simulcasting as the broadcast on the NTSC channel, within 24 hours, of the same basic material as that broadcast on the ATV channel, with the exclusion of commercials and promotions.[271] We will not permit the use of the ATV conversion channel of an ATV-NTSC pair for subscription services on a stand-alone basis.[272]

73. All parties commenting on the issue agree that we should define simulcasting as the broadcast of the same basic or underlying material.[273] This would permit variances in production techniques, such as different aspect ratios, camera angles, and number of cameras, and the insertion or deletion of specific material, which may be necessary because of technical differences between ATV and NTSC.[274] This approach would also help showcase the differences in the two technologies and thus help increase consumer attraction and ultimately ATV receiver penetration.[275] We also agree with the consensus of commenting parties that "program," for purposes of the simulcasting

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269 See, e.g., Sony Comments at 40-41 (speculating on a scenario where cable systems downconvert any ATV channel without the need for the consumer to make any hardware purchases).

270 Cf. NTIA Comments at 13 (arguing for review prior to imposing one-step simulcasting requirement at the nine-year mark); Fox Comments at 3, 8 (arguing for deferral of simulcast issue until 1998, the then-date for close of application/construction period in order to better assess such factors); MSTV Reply at ii, 16, 23 (alternatively arguing for periodic review in 1998).

271 We sought comment on how to define simulcasting in the Second Report/Further Notice, 7 FCC Rcd at 3357.

272 This restriction applies to the use of the ATV conversion channel throughout the 15-year transition period, not merely during the period in which simulcasting is required.

273 See, e.g., NCTA Comments at 16; Joint Broadcasters at 22; Grass Valley Comments at 2.

274 Fox Comments at 14; MPAA Comments at 7.

275 NCTA Comments at 16.

definition, should exclude commercials and promotions.[276] Such exclusions will allow broadcasters to experiment with ATV production and to maximize revenues to finance the transition to ATV. We also clarify that simulcasting means the broadcast of the same basic material as shown on the ATV channel on the NTSC channel, but not also the converse.[277] One main concern in imposing simulcasting is the protection of consumer investment in existing equipment. This goal is satisfied by insuring that NTSC viewers are shown the same programs as ATV viewers. Requiring broadcast of NTSC programming on the ATV channel would also not further any of the other policies underlying our simulcast approach.

74. We further agree with those commenting parties who support defining "simulcast" of a program as broadcast of that program within a 24-hour period.[278] Permitting multiple plays of ATV programs that can be downconverted and simulcast on NTSC should ease any technical difficulties that may remain at the time of simulcasting in downconverting particular types of ATV programs, as well as any difficulties broadcasters may face in locating, arranging for, and establishing relations with sources of new ATV programming.[279] We agree with Fox that allowing pre-released and multiple plays of programs on the ATV channel within a 24-hour period could increase the attractiveness of the ATV channel to viewers, thus helping to spur ATV penetration.[280] The 24-hour rule will not disenfranchise NTSC-only viewers,

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[276] Joint Broadcasters Comments at 22; Fox Comments at 14; NCTA Comments at 17.

[277] Thus, for example, under 100 percent simulcasting, all programs shown on the ATV channel would also be shown on the NTSC channel. If the broadcast day of the NTSC channel is longer than that of the ATV channel, however, not all programs aired on the NTSC channel would also be shown on the ATV channel. We seek comment on whether, if we permit ancillary uses, we should require minimum operating hours on the ATV channel infra Section VII.C.

[278] See, e.g., Joint Broadcasters Comments at 22; Fox Comments at 15; Golden Orange Comments at 6; NAB Reply at 7.

[279] See supra Section VII.A. Although we do not foresee a problem in obtaining ATV programming, it is possible that broadcasters may have to explore different programming sources when they broadcast in ATV as opposed to conventional NTSC.

[280] Fox Comments at 15. NCTA argues that such a 24-hour rule would "cross the line into the development [of the ATV channel] as a separate programming service". NCTA Comments at 17. We observe in this connection that ATV programming, including that offered within a 24-hour period, is still "television service" within the meaning of our existing rules; it merely uses different transmission technology. 47 C.F.R. Part 73, Subparts E, H. Traditionally, our interpretation of "television service" has included a broad class of program types. See, e.g., Family Media, Inc., 2 FCC Rcd 2540 (1987) (permitting home shopping television programming).

as NCTA suggests.[281] Viewers will still see essentially the same programs, only at different times, a point that NCTA concedes. A 24-hour rule will allow broadcasters to increase ATV penetration through new means of attracting consumers to ATV, to experiment creatively with ATV program scheduling, and to respond more freely to local market demands. Such a definition will thus further the implementation of ATV in an expeditious and efficient manner, contrary to NCTA's position.[282] Indeed, this added flexibility may provide the spur to ATV implementation and penetration that will permit swift recapture of the reversion channel.[283] Moreover, if it appears that ATV develops in a fashion making these rules inappropriate, we will be able to modify them at our periodic reviews prior to phase in of the simulcasting requirement.[284]

75. Contrary to Fox' proposal,[285] we will not allow broadcasters with ATV/NSTC channel pairs to use their ATV channel for a stand-alone subscription ATV service, separate from a free NTSC service. To do so would encourage use of the ATV channel as a separate service, based on subscriber and not advertiser revenues. These effects and incentives are contrary to the reason we are awarding broadcasters a second channel--to permit the viewing public to make a nondisruptive transition to ATV and allow the reclamation of the second channel after that transition is complete.[286]

C. "ATV Programming": Reconsideration/Further Notice

76. The Second Report/Further Notice stated that we would expect non-simulcast programming on the ATV channel to take full advantage of ATV technical capabilities.[287] Considering that this Commission is devoting a large amount of prime spectrum to an ATV service, we continue to expect broadcasters to take full advantage of the capabilities of ATV. As discussed above, we are seeking comment on whether to permit other types of advanced

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[281] NCTA Comments at 17.

[282] NCTA Comments at 17-18.

[283] Former Section 73.242, 47 C.F.R. § 73.242 (deleted 1986), limited the duplication of programming on AM and FM stations co-owned in the same local area and defined duplication as the "simultaneous broadcasting" or broadcasting "within 24 hours" of an "identical program." This rule was intended to foster development of FM radio and to reduce spectrum inefficiency. Amendment of Section 73.242 of the Commission's Rules and Regulations in Regard to AM-FM Program Duplication, 103 FCC 2d 922, 923 (1986).

[284] See supra Section VII.A.

[285] See Fox Comments at 15.

[286] Second Report/Further Notice, 7 FCC Rcd at 3342-43.

[287] Second Report/Further Notice, 7 FCC Rcd at 3357.

technology uses on the ATV channel. To attempt to define what is or is not ATV programming at this time might lead us to inadvertently prohibit some sources and formats of programs on ATV channels that would be highly desirable to viewers. Accordingly, we will defer further defining "ATV programming" until we have the benefit of a record on other types of advanced technology that might be appropriately permitted on the ATV channel. We also defer a decision on EIA/ATV Committee's recommendation[288] for a requirement of a minimum number of hours that broadcasters must air of "true" HDTV quality programming, while reiterating our intention that the ATV channel not be squandered.

77. Fox and MSTV support permitting broadcasters to raise additional revenue on their ATV channels by using these channels for ancillary purposes, analogous to ancillary uses of NTSC such as the use of the vertical blanking interval (VBI), subsidiary communication authorizations (SCA), and second audio programming (SAP).[289] Under the proposal, excess data capacity would be used in two ways. It might be used during times when the ATV channel was otherwise non-operational, such as overnight. Such excess data capacity might also be used on a non-interfering basis during ATV transmission. Such ancillary uses, if technically possible, might be critical to successful implementation of ATV in its early stages, when receiver penetration is low. We have previously permitted ancillary uses of this nature to help spur development of a new technology.[290] On the other hand, we would not want such ancillary uses to predominate over the primary use of the channel. Accordingly, we seek comment on the technical feasibility and policy implications of permitting such ancillary uses. Should we permit such ancillary uses during non-operation time, we also seek comment on whether we should require some minimum operating schedule for ATV, as we currently impose on NTSC operators.[291] We observe in this connection that such a requirement might help ensure that the public received maximum value from conversion spectrum granted to broadcasters.

VIII. PATENT LICENSING AND RELATED ISSUES: REPORT AND ORDER

78. We have previously stated that in order for ATV implementation to be fully realized, the patents on any winning ATV system would have to be

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288 EIA/ATV Committee Comments at 10-11.

289 Fox Comments at 13-14; MSTV Reply at 27. Broadcasters are permitted to provide such ancillary services on the current NTSC frequency so long as there is no observable degradation to any portion of the visual or aural signals. 47 C.F.R. §§ 73.682(a)(23)(ii), 73.646.

290 For example, ancillary use of a frequency was allowed in order to initiate the development of Direct Broadcast Satellite Service, or DBS. United States Satellite Broadcasting Co., Inc., 1 FCC Rcd 977 (1986), recon. denied, 2 FCC Rcd 3642 (1987).

291 47 C.F.R. § 73.1740(a)(2).

licensed to other manufacturing companies on reasonable terms.[292] The ATV testing procedures already require proponents to submit, prior to testing, a statement that any relevant patents they own would be made available either free of charge or on reasonable, nondiscriminatory terms.[293] Contrary to the views of some,[294] we continue to believe that this requirement adequately safeguards the consumer and competitive interests in reasonable availability of relevant patents, and thus, that greater regulatory involvement is not necessary at this time.[295] We nevertheless appreciate the importance of this issue, and will, as EIA/ATV Committee suggests, remain responsive to any complications or abuses that may arise.[296] We also reiterate that we will condition the selection of an ATV system on the proponent's commitment to reasonable and nondiscriminatory licensing of relevant patents.[297]

79. The Second Report/Further Notice recognized the importance of prompt disclosure of a winning system's technical specifications to the mass production of ATV professional and consumer equipment in a timely fashion.[298] EIA/ATV Committee asserts that incomplete or unavailable documentation would result in major delays in ATV implementation. According to ATSC, immediately after the Advisory Committee recommends a system, ATSC will document the ATV

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292 Notice, 6 FCC Rcd at 7034; Second Report/Further Notice, 7 FCC Rcd at 3358.

293 Proponents are required to follow the American National Studies Institute (ANSI) patent policies in certifying as to the availability of relevant patents they hold. ANSI requires assurance that:

(1) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard, or

(2) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

ATV Test Procedures Test Management Plan, Appendix A, § D.2 (Rev. Sept. 25, 1990).

294 Grass Valley Comments at 5-6.

295 Second Report/Further Notice, 7 FCC Rcd at 3358. See also AT&T Comments at 6.

296 EIA/ATV Committee Comments at iii, 11-12.

297 Second Report/Further Notice, 7 FCC Rcd at 3358.

298 Second Report/Further Notice, 7 FCC Rcd at 3358. See also EIA/ATV Committee Comments at iii, 12.

technical standard as it will be implemented for broadcast transmission.[299] Other industry groups will document the specifications needed for other media.[300] We appreciate the diligence with which ATSC and the other groups participating in standardization are pursuing these matters, as well as the attention which the Advisory Committee has given this question.[301] We encourage ATSC and its member groups, as Joint Broadcasters and EIA/ATV Committee suggest,[302] to begin the actual documentation process as soon as they have sufficient data.

IX. COMPATIBILITY

A. Other Transmission Forms and Media Applications: Report and Order

80. The Second Report/Further Notice recognized the importance of ATV compatibility with other transmission forms and media applications, both in terms of the successful marketplace acceptance of ATV and for purposes of selecting an ATV transmission standard.[303] Parties commenting on the issue generally favor such compatibility,[304] some noting in particular the importance of compatibility with other video delivery media, such as cable and VCRs.[305] We also agree with EIA/ATV Committee and AT&T that compatibility issues are part of our overall goals in this proceeding and must be considered with other objectives, such as timely delivery of ATV technology to the

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[299] ATSC Further Comments at 4; ATSC Comments, Annex I at 1-2.

[300] ATSC Comments, Annex I at 2-4 (SMPTE will formulate specifications for inter-studio distribution; IEEE, specifications for broadcast testing and measurement standards and terminology; EIA, consumer ancillary data, receiver interference standards, consumer VCR interchange standards and consumer equipment testing standards; NCTA, cable distribution; SBCA, DBS distribution and satellite commercial distribution.)

[301] We note that ISWP2 has offered suggestions to ATSC on the timely documentation of the ATV standard. See letter from Craig K. Tanner, Co-chairman of Advisory Committee Implementation Subcommittee Working Party 2, to Lynn Claudy, Chairman of ATSC T3/S1 (dated Aug. 24, 1992).

[302] EIA/ATV Committee Comments at iii, 12; Joint Broadcaster Comments at v, 25.

[303] Second Report/Further Notice, 7 FCC Rcd at 3359-60.

[304] EIA/ATV Committee Comments at iii, 13; MPAA Comments at 8; AT&T Comments at 5.

[305] Sony Comments at 37; EIA/ATV Committee Comments at iii, 13; MPAA Comments at 8.

American public.[306] In particular, we endorse, as does NCTA, the efforts of the Advisory Committee, through its Field Test Task Force, to ensure that the system selected as the ATV standard performs satisfactorily for both broadcast and cable operations.[307] We similarly encourage the ongoing efforts of the Advisory Committee to foster compatibility with computer and other data applications.

B. Dual-Mode Receivers: Further Notice

81. FIT, who proposes an ATV system to be received on conventional NTSC television sets, claims that the All Channel Receiver Act[308] and our implementing rules require that a new ATV system be compatible with existing receivers.[309] The All Channel Receiver Act gives us the authority to require that television receivers "be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting."[310] The All Channel Receiver Act does not preclude selection of a broadcast transmission system that requires new receivers. It also does not mandate the manufacture of dual-mode receivers. We further note that some manufacturers believe that, as a practical matter, in the transition period, ATV receivers will be dual mode.[311] We also observe that we do not have precise evidence regarding the relative costs of dual mode receivers, as opposed to NTSC sets supplementally equipped with downconverters. We are concerned that we not establish manufacturing requirements that may overly or prematurely burden consumers.

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306 EIA/ATV Committee Comments at 14; AT&T Comments at 5. We thus welcome the contributions towards compatibility of parties such as EIA. See EIA/ATV Committee Comments at 14 n. 16 (noting EIA's participation in and establishment of an ATV Receiver Interface Subcommittee).

307 NCTA Comments at 5-6 n. 6. We expect that this Task Force, which is in the process of compiling a report to the Advisory Committee, will adequately address the contingency of a system's failing to perform adequately in the field, a concern of NCTA's. As ATV receivers have not yet been produced, the Task Force will be unable to accommodate FIT's request that the picture quality of each of the proponent systems be tested on consumers. FIT Comments at 9.

308 47 U.S.C. §303(s), 47 C.F.R. § 15.117.

309 FIT Comments at 6-8; FIT Reply at 5-7.

310 47 U.S.C.§303(s). The Senate Report cited by FIT indicates that Congress intended by the Act to give the FCC the power to require "that all television receivers shipped in interstate commerce or imported into the United States be equipped at the time of manufacture to receive all television channels." S. Rep. No. 1526, 87th Cong., 2d Sess., at 1 (1962); FIT Comments at 8 n.9.

311 See Zenith Comments at 5; Sony Comments at 48-49; NAB Reply at 5. The cost to implement NTSC-capability in these receivers is estimated at $50-$100. Zenith Comments at 5; NAB Reply at 5.

In light of the foregoing, we seek comment on whether there is any need to require that manufacturers produce receivers capable of both NTSC and ATV reception during the period prior to full conversion to ATV. In particular, we seek comment on the effect such a requirement would have, if any, on the cost of receivers to consumers.

C. Audio Advances: Report and Order

82. The Second Report/Further Notice directed the Advisory Committee (1) to address any new audio developments; (2) to address ATSC proposals for flexible use of audio and data; and (3) to consider any analogous instances of extensibility that arise.[312] Dolby, ATSC, EIA/ATV Committee, Lucasarts and Joint Broadcasters agree that the issue of audio advances warrants consideration as an attribute of an ATV system.[313] The Advisory Committee is in the process of addressing these issues[314], and we encourage these efforts. It would be premature for us to intervene in these matters at this stage of Advisory Committee proceedings, as some suggest, and we decline to do so.[315]

X. NEW DEVELOPMENTS: REPORT AND ORDER

83. The Second Report/Further Notice sought comment on the Advisory Committee's findings that there are no new technologies that offer important new benefits and are in a sufficiently concrete state of development to be considered with the existing systems.[316] The majority of commenting parties concur in the Advisory Committee's assessment.[317] However, several parties, including ATSC, recognize that there may be potential significance in an emerging digital transmission technology, Coded Orthogonal Frequency Division

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312 Second Report/Further Notice, 7 FCC Rcd at 3362.

313 Dolby Comments at 2-8; ATSC Further Comments at 3; EIA/ATV Committee Comments at iii, 16; Lucasarts Comments at 1-2; Joint Broadcaster Comments at v, 24-25.

314 Minutes of Joint Meeting of FCC Advisory Committee on Advanced Television Service Planning Subcommittee Working Party 1 on ATS Technology Attributes and Assessments and Working Party 2 on ATS Test Planning, at 2-3 (July 15, 1992), PSWP1 and WP2-088 (adding attributes 3.1.1 (independently coded channels), 3.1.2 (matrix surround coded channels), 3.1.3 (composite coded channels)) (Preliminary Audio Amendment).

315 Dolby Comments at 8; EIA/ATV Committee Comments at 16. We observe that the Preliminary Audio Amendment, supra, includes preliminary options that appear to answer the technical concerns raised by Lucasarts and Lim. Lucasarts Comments at 1-2; Lucasarts Additional Comments; Lim Comments at 2-4.

316 Second Report/Further Notice, 7 FCC Rcd at 3362.

317 Joint Broadcasters Comments at 24; ATSC Further Comments at 3; EIA/ATV Committee Comments at 17; GI Comments at 2-3; AT&T Comments at 6; Zenith Reply at 11-12.

Multiplex (COFDM), which is being tested in Europe.[318] We direct the Advisory Committee to monitor these developments and report to us as appropriate.[319] We understand that the Advisory Committee is presently exploring the potential use of multiple low power transmitters with proponent ATV systems.[320] We defer further consideration of this question, which Symes also raises in his comments,[321] until this task is complete.

84. Two other commenters outline in their pleadings new HDTV technologies.[322] It appears that these parties have yet to submit documentation to the Advisory Committee showing that their systems "offer important new benefits" and "are in a sufficiently concrete state of development to be considered with the existing systems."[323]

XI. PROCEDURAL MATTERS

A. Notice and Comment Provisions

85. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 21, 1992 and reply comments

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[318] Symes Comments at 2-3; Schreiber Comments at 7-8; Schreiber Reply at 2; ATSC Further Comments at 4 n.5.

[319] AT&T argues that orthogonal frequency division multiplex and single frequency networks may pose difficulties in an HDTV application. See AT&T Reply at 2-5. While we recognize that these arguments may have merit, we believe that no substantial delay would be caused by monitoring the development of COFDM, while at the same time there may be potential benefits from such additional data. Cf. Schreiber Reply at 3-5.

[320] ISWP2 is addressing the issue and has requested from SSWP1 a study of the technical feasibility of distributed transmission with proponent ATV systems. See letter from Merrill Weiss, Vice Chairman of Advisory Committee Implementation Subcommittee Working Party 2, to Birney Dayton, Chairman of Advisory Committee Systems Subcommittee Working Party 1 (dated Aug. 4, 1992).

[321] Symes Comments at 2-3. We also defer the related question which Telemundo raises, of permitting stations to initiate ATV broadcasts using relatively low power facilities, until we have the benefit of the ISWP2 report. Telemundo Comments at 4. See also MSTV Reply at 26 (allow stations to begin HDTV broadcasts at low power); Micro Reply (new channel assignments should be permitted to operate at lower than maximum effective radiated power (ERP) for the same reason that over 80% of the present UHF stations are now operating at lower than maximum ERP). But see Zenith Reply at 10 (require minimum HDTV field strength over principal community).

[322] Quadratic Comments at 1-2; FIT Comments at 2-4.

[323] First Order, 5 FCC Rcd at 5629.

on or before January 29, 1993. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., Washington, D.C. 20554.

B. Ex Parte Rules

86. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.203, and 1.206(a).

C. Regulatory Flexibility Act Statement

87. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this decision, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. A Final Regulatory Flexibility Analysis Statement is contained in Appendix C. The Secretary shall send a copy of this Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1980).

XII. ORDERING CLAUSES

88. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303, this Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rule Making IS ADOPTED.

89. IT IS FURTHER ORDERED that the Petitions For Reconsideration filed by America's Public Television Stations, et al., Association for Maximum Service Television, Inc., Diversified Communications, et al., National Association of Broadcasters, National Capital Communications, Inc., and Polar Broadcasting, Inc., et al., ARE GRANTED IN PART AND DEFERRED IN PART TO THE EXTENT INDICATED HEREIN AND OTHERWISE DENIED.

90. IT IS FURTHER ORDERED that the Motion for Leave to File Comments out of Time of the Office of Advocacy of the Small Business Administration IS GRANTED and its Comments ARE ACCEPTED.

91. For further information regarding this proceeding, contact Gina Harrison, Legal Branch, Policy and Rules Division, Mass Media Bureau (202) 632-7792, Gordon Godfrey, Engineering Branch, Policy and Rules Division, Mass Media Bureau (202) 632-9660, or Alan Stillwell, Office of Engineering and Technology (202) 653-8162.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Reconsideration Petitions
(filed June 22, 1992 unless otherwise indicated)

America's Public Television Stations, Corporation for Public Broadcasting, Public Broadcasting Service (Public Television) (Clarification and Partial Reconsideration)

Association for Maximum Service Television, Inc. (MSTV) (Partial Reconsideration)

Diversified Communications, Maine Radio and Television Company, Guy Gannett Publishing Company (Diversified)

National Association of Broadcasters (NAB) (Partial Reconsideration)

National Capital Communications, Inc. (NCCI) (Partial Reconsideration and/or Clarification)

Polar Broadcasting, Inc., LPTV stations K08LC, K33DJ, K69FX, K30BI; Polar Broadcasting of Arizona, Inc., LPTV station K67FE; Linda K. Trumbly, LPTV stations K67FE, K22DD, K36CS; Ted C. Tucker, LPTV station K43CW; Gary M. Kenny, LPTV station K32CL; Gary M. Kenny & Deborah R. Kenny, LPTV stations K09VM, K46CZ; Peggy L. Davis and Deborah R. Kenny, LPTV station K38DD; Gary Cocola LPTV stations K34AV, K66CQ, K04NT; Kurt J. Petersen, LPTV station K58DH; Randy Weigner LPTV station W33AV; Glenn R. Plummer & Karin A. Plummer, LPTV station W48AV; Roger Skinner, LPTV station W27AQ; Buffalo Communications, Ray "Black Buffalo" Wilson, Chairman, LPTV station K53DU; Sara Biaz Warren, full-power station KJLF-TV; Vision Broadcasting Network, Inc., Pete E.M. Warren, President, LPTV station K63CD, K12MP; Broadcasting Systems Inc., Kenneth Casey, President, LPTV station K25DM; BSP Broadcasting Inc., Pete D'Costa, President, LPTV station K35BO, K53DS, full-power television station KJTL-TV; KCIT Acquisition Company, Pete D'Costa, President, full-power television station KCIT-TV; Dupont Investment Group-85.LTD, William K. Maxwell, General Partner, LPTV station K33DB; San Jacinto Television Corporation, Max F. Vigil, President, full-power television station KTFH-TV; White Sage Broadcasting Co., Larry Rogo, Managing Partner LPTV station K07UI; Channel 29 Associates, Larry Rogo, Managing Partner, LPTV station W29AH; Fireweed Television, Carol Schatz, President LPTV station K06LY, K18CS, full power station KYES-TV, and Kidd Communications, Chris Kidd, Owner LPTV station K43CT; and Assal Broadcasting Co., Gary Spire, Owner, LPTV station W05BZ (Polar) (filed June 17, 1992, corrected June 18, 1992)

Parties Filing Oppositions to Reconsideration Petitions
(filed July 16, 1992 unless otherwise indicated)

MSTV Opposition to and Comments on Petitions for Reconsideration of Polar

Broadcasting, et al and NCCI (MSTV Opposition) (July 16, 1992)
Public Television (July 16, 1992)

Parties Filing Replies to Oppositions to Reconsideration Petitions

MSTV
NCCI

Pleadings Supporting or Commenting Upon Reconsideration Petitions or Issues

Community Broadcasters Association (supporting reconsideration petition) (CBA) (filed June 16, 1992)
Freedom Newspapers, Inc. (supporting reconsideration petitions) (Freedom) (filed July 10, 1992)
Gillett Holdings, Inc., SCI Television, Inc., and Busse Broadcasting Corporation (commenting on petitions for partial reconsideration) (GHI) (July 16, 1992)
Morgan Murphy Group (supporting petitions for reconsideration) (Morgan Murphy) (July 16, 1992)
Network Affiliated Stations Alliance (supporting reconsideration petitions) (NASA) (filed July 15, 1992)

Commenting Parties
(filed July 17, 1992 unless otherwise indicated)

Advanced Television Systems Committee (ATSC) (June 5, 1992)
American Telephone and Telegraph Company (AT&T)
ATSC Further Comments (filed July 15, 1992)
Brechner Management Company, on behalf of Northeast Kansas Broadcast Service, Inc., licensee of KTKA-TV, Topeka, Kansas and Delmarva Broadcast Service General Partnership, licensee of WMDT-TV, Salisbury, Maryland (Brechner) (filed July 10, 1992)
Brunson Communications, Inc. (Brunson)
Capital Cities/ABC, Inc. (CapCities)
CBS, Inc. (CBS)
Cohen, Dippell, and Everist (CDE)
Dolby Laboratories (Dolby)
EIA/ATV Committee (EIA/ATV) (states that filed as timely responses to reconsideration petitions also) (July 16, 1992)
Fox, Inc. (Fox)
Future Images Today (FIT)
General Instrument Corporation (GIC)
Golden Orange Broadcasting Co., Inc. (Golden Orange)
Grass Valley Group, Inc. (Grass Valley) (June 29, 1992)
Island Broadcasting Co. (Island)
Joint Broadcasters (consisting of Association for Maximum Service Television, Inc.; National Association of Broadcasters; Public Broadcasting Service; Capital Cities/ABC, Inc.; Association of Independent Television Stations, Inc.; Association of America's Public Television Stations; CBS, Inc.; National Broadcasting Company, Inc.; Network Affiliated Stations Alliance, ABC Televison Network Affiliates Association; Fox, Inc., and Fox Television

Stations, Inc.; CBS Television Network Affiliates Association; NBC Television Network Affiliates Association; A. H. Belo Corporation; American Family Broadcast Group, Inc.; Bahakel Communications, Ltd.; Bonneville International Corporation; Busse Broadcasting Corporation; Allbritton Communications Group; Associated Broadcasters, Inc., Benedek Broadcasting Corporation; Burnham Broadcasting Company, A Limited Partnership; Capitol Broadcasting Company, Inc.; Cedar Rapids Television Company; Cosmos Broadcasting Corporation; Diversified Communications; Encore Communications, Inc. of Syracuse; Freedom Communications, Inc.; Chronicle Publishing Company; Cox Communications, Inc.; Eagle Communications, Inc.; Engles Communications, Inc.; Freedom Newspapers, Inc.; Freedom-TV Sub, Inc.; Fisher Broadcasting, Inc.; Galloway Media, Inc.; Gateway Communications, Inc.; Gray Communications Systems, Inc.; Freedom WLNE-TV, Inc.; Forum Publishing Company; Gannett Co., Inc.; Gillett Holdings, Inc.; Granite Broadcasting Corporation; Great American Television and Radio Company, Inc.; Griffin Television, Inc.; Heritage Media Corporation; Independent Broadcasting Company; Kelly Broadcasting Co.; Greenville Televison, Inc.; The Hearst Corporation; Hubbard Broadcasting, Inc.; Jefferson-Pilot Communications Company, Jefferson-Pilot Communications Company of Virginia; Kelly Televison Co.; King Broadcasting Company; KTAL-TV, Inc.; Media Gerneral Broadcast Group; McGraw-Hill Broadcasting Company, Inc.; Midstate Televison, Inc.; Koplar Communications, Inc.; Lin Broadcasting Corporation; Meredith Corporation; Michiana Telecasting Corp.; Midwest Television, Inc.; ML Media Partners, L.P.; Multimedia Broadcasting Co.; Nepsk, Inc.; Plains Television Partnership; Ponce-Nicasio Broadcasting, Ltd.; Morgan Murphy Group; Nationwide Communication, Inc.; The New York Times Company (and its broadcast subsidiaries); Pollock/Belz Communications Co., Inc.; Post-Newsweek Stations, Inc.; Precht Televison Associates, Inc.; Quincy Newspaper Broadcast Group; Retlaw Eneterprises, Inc.; Sarkes Tarzian, Inc.; Scripps Howard Broadcasting Company; The Providence Journal Company; Renaissance Communications Corp.; Rose Communications; SCI Television, Inc.; Spartan Radiocasting Co.; Sunbeam Televisoion Corporation; Tribune Broadcasting Company; Vermont ETV, Inc.; WBNS-TV; WGBH Educational Fundation; Sunshine Television, Inc.; United Communications Corp.; W. Russell Withers, Jr., Licensee of KREX-TV, KREZ-TV, KREG-TV, KREY-TV, WDTV and KAVU-TV; Westinghouse Broadcasting Company, Inc.; WKEN Broadcasting Corporation; WLOX Television, Inc.; WPSD-TV; WTHR-TV; WTVZ, Inc.; Young Broadcasting, Inc.; WPEC/Photo Electronics Corporation; WRGB Broadcasting, Inc.; WTVC, Inc.; WWOR-TV, Inc. (Joint Broadcasters)

Land Mobile Communications Council (LMCC)

Jae S. Lim, Professor of Electrical Engineering, Director of Advanced Television Research Program, Massachusetts Institute of Technology (Lim) (filed July 16, 1992)

Lucasarts Entertainment Company (Lucasarts) (filed July 16, 1992)

Additional Comment of Lucasarts (Lucasarts Additional Comment)

MSTV, submitting Report of Larry F. Darby, "Implementation of Broadcast High Definition Television: Costs, Burdens, and Risks" (Darby Report)

Micro Communications, Inc. (Micro) (July 16, 1992)

Motion Picture Association of America (MPAA)

National Cable Television Association (NCTA)

National Telecommunications and Information Administration (NTIA)

Office of Advocacy, Small Business Administration (Aug. 3, 1992)

Public Television
Quadratic Solutions, Inc. (Quadratic)
Hector Garcia Salvatierra (Salvatierra)
William F. Schreiber , Professor of Electrical Engineering, Emeritus, Research Laboratory of Electronics, Massachusetts Institute of Technology (Schreiber) (filed July 14, 1992)
Skinner Broadcasting, Inc. (Skinner)
Sony Corporation of America (Sony)
Sutro Tower, Inc. (Sutro) (July 16, 1992)
Peter D. Symes (Symes) (June 29, 1992)
Telemundo Group, Inc. (Telemundo)
Zenith Electronics Corporation (Zenith)

Parties Filing Informal Comments

Mike Stone (Stone) (filed 20, 1992)

Parties Filing Reply Comments
(filed August 17, 1992 unless otherwise indicated)

AT&T
FIT
Micro
MSTV
NAB
NCTA
Zenith

Parties Filing Informal Replies

Schreiber (filed Aug. 24, 1992)

APPENDIX B

Initial Regulatory Flexibility Statement

I. Reason for Action:

1. This action is taken to invite further comment on outstanding questions affecting implementation of advanced television (ATV) service in this country.

II. Objectives of the Action:

2. The Commission seeks further comment on the issues surrounding the introduction of ATV service in order to establish a comprehensive, reliable record on which to base decisions in this area. The record established by this proceeding will ensure that our rules lead to the harmonious and efficient implementation of ATV in the United States.

III. Legal Basis:

3. Authority for this action may be found in 47 U.S.C. §§ 154 and 303.

IV. Reporting, recordkeeping and other compliance requirements:

4. No reporting, recordkeeping, or compliance requirements are specifically proposed in this notice.

V. Federal rules which overlap, duplicate or conflict with these rules:

5. This notice proposes no rules which would overlap, duplicate or conflict with other federal rules.

VI. Description, potential impact and number of small entities involved:

6. Approximately 1,500 licensed commercial and educational UHF and VHF television stations, approximately 4,918 licensed UHF and VHF translator stations and approximately 1,284 licensed UHF and VHF low-power television stations could be affected by the actions ultimately taken in this proceeding. Professional and consumer equipment manufacturers also will be impacted by our decisions.

7. This notice makes proposals that potentially could affect small entities. We invite comment on several proposals involving the disposition of the corresponding ATV paired channel in instances of a successful renewal challenge for an NTSC channel. We tentatively decide that a renewal challenger should be permitted to file a supplemental application for the ATV channel, which would be contingent upon grant of the challenger's NTSC application. The contingent ATV application would not be subject to a second comparative hearing.

8. Noncommercial television operators would be positively affected by our proposals to account for their special difficulties in obtaining funding

within the application/construction period we establish. We also invite comment on other methods of relief. Noncommercial television operators likewise stand to benefit from our decision to extend the application/construction period from five years to six and to permit those who apply early a correspondingly longer time (within the six-year overall period) to construct.

9. We solicit comment on whether it would be necessary to exercise our authority under the All Channel Receiver Act to require manufacturers to produce receivers capable of both NTSC and ATV reception during the period prior to full conversion to ATV.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives:

10. In offering proposals for public comment in all facets of this proceeding, we have tried to select alternatives that would cause the least disruption to the least number of parties. This concern is reflected in the proposals adopted and discussed in the Final Regulatory Flexibility Act Statement in Appendix C. For example, we acknowledge that initial ATV application priority for existing noncommercial television broadcasters could be jeopardized by their inability to meet the application/construction deadline due to delays caused by their reliance on governmental funding and private donations. In this notice, we suggest the following means of compensating for this disadvantage: establishing a special application period for noncommercial licensees; relaxing the financial requirements noncommercial stations must meet during the application period; and intensifying our coordination with funding agencies such as the National Telecommunications and Information Administration. We solicit comment on these and other responses to noncommercial television's unique circumstances.

11. In order to permit affected entities to take advantage of compatible technological innovations, we invite comment on the types of advanced digital uses that might be permitted on the ATV channel.

12. Finally, we seek comment on whether to allow broadcasters the flexibility to generate additional revenue on their ATV channels, which would help finance the investment and operation of their ATV channels, by using these channels for ancillary purposes, analogous to ancillary uses of NTSC.

APPENDIX C

FINAL REGULATORY FLEXIBILITY STATEMENT

I. Need and purpose of this action:

1. The Third Report and Order portion of this decision resolves critical issues concerning implementation of Advanced Television (ATV) Service in this country. Our goal is to select the best ATV system and the most effective procedures for implementing that choice, with optimum results for the industries involved and the public, and with minimum negative consequences.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

2. Although the Small Business Association (SBA) acknowledges the need to set a conversion date for stations which have invested in ATV equipment, it questions our contention in the Final Regulatory Flexibility Analysis that mandatory across-the-board conversion is necessary for administrative simplicity. SBA maintains that small businesses (particularly low-power television stations) might never recover from the financial burden of premature mandatory conversion to ATV. SBA suggests that the Commission wait for the market for ATV to develop naturally, based on consumer demand. This approach would allow stations to optimize use of their current facilities and broadcast equipment, plan a conversion schedule suitable to their size and audience, and obtain the best financing possible. Finally, SBA fears that equipment suppliers will enjoy an artificial market and lack incentives for reasonable pricing.

3. SBA also comments that, although it favors suspension of the dual network rules, to ensure efficient ATV implementation, this suspension should not extend to situations where a network's ATV and NTSC feeds go to different licensees in the same broadcast market. SBA cites three reasons for its position on this issue: (1) allowing non-network affiliate stations to broadcast network ATV programs will deprive the affiliate of the ratings and revenues it might have received by airing the same program over an NTSC channel or will force affiliates to compete with non-affiliates; (2) allowing the network's ATV feed to go to a different licensee in the market defeats the purpose of the suspension, and imperils small independent station operation; and (3) the networks' argument that consumers might be initially denied ATV programming is outweighed by the potential damage which may be caused to local broadcasters. SBA "sees no reason to bolster the health of the networks at the expense of their local affiliates." SBA states that affiliates, to maximize their revenues, will invest in ATV technology when they find it appropriate, and until that time, networks must be prohibited from forcing their affiliates to compete for network programming with other stations in the same market.

III. Significant alternatives considered and rejected:

4. The Third Report/Third Notice does not accept SBA's arguments regarding conversion. We question SBA's view that a station that has not made the investment in ATV equipment, as SBA posits will be the case for smaller

stations, would be less likely to "tie up" spectrum resource than one who has actually made an investment. If we extended our conversion period to accommodate a station's individual decisions on when to invest in ATV technology, as SBA suggests, we would have no guarantee that the conversion channel would be used for any purpose in any reasonable period of time, and no guarantee that the reversion channel could be reclaimed at any given point. We believe that a timetable for surrender of simulcast channels will expedite the freeing of spectrum of significant value to other users. Existing broadcasters likely will be awarded most of the available ATV channels, and, as a result, will not face unrestrained competition from new entrants. We find that a timetable for ATV development substitutes for such competition and encourages broadcasters to meet consumers' needs in a timely fashion. We thus decline SBA's suggestion that we adopt an approach to ATV implementation that permits broadcasters to plan their own conversion schedules.

5. With respect to SBA's position regarding the dual network rule, we expect that low receiver penetration at the start of ATV implementation is likely to make ATV advertising revenues relatively small compared to NTSC revenues, so that a network is unlikely to favor its new ATV affiliate over its NTSC affiliate. In addition, we do not agree that we should protect existing affiliates even at the expense of denying viewers a network ATV signal in a particular community. Should our projections regarding the development of ATV ultimately be disproved, we can adjust our policies at our periodic reviews of the ATV implementation timetable that we have scheduled. If in fact ATV programming proves lucrative from the beginning, it is likely that the network affiliate will be motivated to implement ATV and will not be subject to competition from a separate ATV affiliate. We thus temporarily suspend the dual network rule during the transition to ATV.

APPENDIX D

LIST OF UNPUBLISHED DOCUMENTS

ATV Test Procedures Test Management Plan (Rev. Sept. 25, 1990)

FCC Advisory Committee on Advanced Television Service, Implementation Subcommittee Working Party 2 on Transition Scenarios, Report on Survey Regarding Software Availability (Aug. 24, 1992) (ISWP2 Software Survey)

FCC Advisory Committee on Advanced Television Service, Implementation Subcommittee Working Party 2 on Transition Scenarios, Summary of Responses to Questions for Proponents (Aug. 24, 1992) (ISWP2 Summary of Proponent Responses)

FCC Advisory Committee on Advanced Television Service, Implementation Subcommittee Working Party 2 on Transition Scenarios, Transmitter and Antenna Manufacturer Survey (Aug. 24, 1992) (ISWP2 Transmitter and Antenna Manufacturer Survey)

Fifth Interim Report of the FCC Advisory Committee on Advanced Television Service (March 24, 1992), which contains the following document:

> FCC Advisory Committee on Advanced Television Service, Contribution to the Fifth Interim Report of the Implementation Subcommittee from Working Party 2 on Transition Scenarios (Jan. 31, 1992) (ISWP2 Fifth Interim Report)

Fourth Interim Report of the FCC Advisory Committee on Advanced Television Service, which contains the following documents:

> A CBS Work-in-Progress (Oct. 23, 1990, Preliminary Results) (CBS Study), which in turn contains the following document:
>
> > Memorandum by Jules Cohen and Associates (Appendix A) (June 19, 1990)
>
> High Definition Television (PBS Engineering Preliminary HDTV Estimates) (Oct. 1990) (PBS Study)

Letter from Craig K. Tanner, Co-Chairman of Advisory Committee Implementation Subcommittee Working Party 2, to Lynn Claudy, Chairman of ATSC T3/S1 (dated Aug. 24, 1992)

Letter from Merrill Weiss, Vice Chairman of Advisory Committee Implementation Subcommittee Working Party 2, to Birney Dayton, Chairman of Advisory Committee Systems Subcommittee Working Party 1 (dated Aug. 4, 1992)

Market Penetration of HDTV, Working Party Five Planning Subcommittee, Advisory Committee on Advanced Television Service (June 20, 1992) (PSWP5 1992 Study)

Minutes of Joint Meeting of FCC Advisory Committee on Advanced Television Service Planning Subcommittee Working Party 1 on ATS Technology Attributes and

Assessments and Working Party 2 on ATS Test Planning (July 15, 1992), PSWP1 and WP2-088 (Preliminary Audio Amendment)

Results of 1992 International Summer CES On-Site Consumer Surveys (July 26, 1992) (released by PSWP5)

SMPTE documents:

Draft Proposed SMPTE Standard for Composite Analog Video Signal Widescreen NTSC T14.39-02/Rev. 5.0 (August 7, 1991) (private committee document -- not for publication)

Draft Proposed SMPTE Standard for Television Signal Parameters 1050/59.94/2:1 and 525/59.94/1:1 Advanced Television Production Systems, T14.391/Rev. 4.2 (Sept. 6, 1991) (private committee document -- not for publication)

Draft Proposed SMPTE Standard for Television Signal Parameters 787.5/59.94/1:1 and 1575/59.94/2:1 Advanced Television Production Systems, T.14.392/Rev. (Sept. 6, 1991) (private committee document -- not for publication)

Proposed SMPTE Standard for Television -- Digital Representation and Bit-Parallel Interface -- 1125/60 High-Definition Production System, SMPTE 260M (published for comment only)

SMPTE Standard for Television-Signal Parameters -- 1125/60 High-Definition Production System, SMPTE 240M-1988 (approved Mar. 14, 1988)

September 17, 1992

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service (MM Docket 87-268)

No one can accuse this Commission of leaving broadcasters stranded at the starting line in the race to high definition, and of that I am proud. I just hope that we have not stacked the race against broadcasters by turning them into the ATV rabbit, forced to set a pace many cannot sustain.

I do not deny the "chicken and egg" dilemma posed by a new technology requiring new equipment to distribute new programming to new receivers. Success, however desirable, can be thwarted if each player -- manufacturers, programmers, distributors, and consumers -- waits for the others to go first. This is especially true if one of those players perceives the new technology as a substantial investment promising only the means to hold, not gain, market share.

I thus well recognize the need to set a stopwatch on broadcasters' use of another channel for their upgrade to ATV. Indeed, if our timetable spurs all video players into taking a coordinated plunge into ATV, or even if it is overtaken by the pace of an ATV rollout by cable, video cassette providers and other broadcast rivals, then our not-so-subtle nudge to broadcasters will have served both them and the public well.

I am becoming increasingly convinced, however, that the real key to broadcasters' continued competitiveness lies not so much in ATV as a crisp picture, but in its potential for spectrum-efficient multiplexing. In my view, broadcasters must become multichannel providers to continue to flourish in the long run.

The reality checks we have now slated for each critical juncture in our ATV timeline give me some comfort on this concern. I trust that the Commission will take a good hard look at whether the marketplace has ratified each deadline as it draws near. While we adopt this ambitious schedule with confidence levels as high as our expectations, we must not be slave to bureaucratic momentum should we be surprised by the pace of equipment roll-outs, converter breakthroughs, consumer acceptance, or other critical developments.

Indeed, some have suggested that our ultimate conversion deadline should not mandate the end of NTSC broadcasting, but instead require only that broadcasters return their second channel and operate their remaining channel in whichever mode -- NTSC or ATV -- they elect. While that approach could permit a broadcaster to tie up a second channel for 15 years to no productive end, I am sympathetic to its intent. Fortunately, developments with ATV downconverters offer some prospect (if still a costly one) for avoiding the mandated obsolescence of every television set that today burns bright in every home throughout America. Still, I wonder if we could not somehow declare our interest and faith in the emerging, if still unproven, high definition technology without dictating the investment decisions of all broadcasters -- including noncommercial stations and the numerous commercial stations of marginal profitability.

Again I note that, as dramatic as the picture quality improvements of high definition appear to be, the greatest promise that advanced television offers broadcasters may not be qualitative but rather quantitative: the ability, through digital compression, to transform their six megahertz channel of today into a multichannel service. That transformation, of course, will turn not just on technological developments, but the decisions of the marketplace and policymakers as well.

My hope is that, in our commitment not to forestall the bright future of high definition television, we remain attuned to the realities of the marketplace and broadcasters' own judgments as to how best enhance their competitiveness and their service to the American viewer.

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September 17, 1992

STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service (MM Docket No. 87-268)

Last April, the Commission set the hourglass running on broadcast television as we know it. At that time, I noted that the Commission was preparing to embark on a fateful journey: decreeing, in effect, the death of the nation's current, pervasive system of NTSC broadcasting and ushering in a new era of high-definition technology. Today, with the administrative process moving at a remarkable pace, the Commission takes another major step on that journey: We establish a clear framework and brisk timetable for converting the United States to broadcast HDTV within the next 15 years.

When the Commission acted in April, I urged rank-and-file broadcasters to express their views and to get fully involved in our decision-making process. Broadcasters themselves, after all, petitioned the FCC in 1987 to begin the transition to over-the-air HDTV. Five years later, to the surprise of some, HDTV has evolved from an opportunity for pioneering into a plan carrying heavy obligations. The Commission might have expected, therefore, to hear some dissenting and pessimistic sounds from the industry.

The vast majority of broadcasters who have responded during last several months have endeavored to sound an optimistic note. Most expressed hope: hope that they will be equal to the HDTV challenge; hope that consumers will respond favorably; and hope that this new technology--- if the Commission acts wisely--- will carry more benefits than burdens.

What also comes through in the industry's comments, however, is trepidation--- and understandably so. After all, the Commission is <u>mandating</u> the development of this new technology in only one sector of the video marketplace: broadcast television. Other segments of the industry--- program producers, film studios, cable programmers, DBS providers--- can elect to watch from the box seats as broadcasters enter the Colosseum. While shouldering only a fraction of the risk, they will have the luxury of awaiting the answers to the fundamental questions that broadcasters, and the Commission, must grapple with today: Will consumers rally around high-definition? Will compellingly crisp pictures and sound make HDTV indispensable to America's 90 million television households? Will the yet-untested production

capabilities of this bold new medium live up to today's enthusiastic predictions?

The voluminous record in this docket, including the important work of the Commission's Advisory Committee on Advanced Television Systems, provides some assurances about the answers. We are told, for example, that consumers--- not merely in the United States but, indeed, around the world--- will become so enamored of HDTV that NTSC will flicker and die a natural death. We are warned of the distinct possibility that broadcasters may not be at the forefront of this process--- that consumers may instead be attracted by vast quantities of high-definition programming supplied by integrated entertainment companies like Sony/Columbia and Matsushita/MCA--- conglomerates with incentives to seize and dominate both the hardware and the software sides of this new business. We are told, furthermore, that rapid progress in digital technologies means that HDTV will be just one morsel on a vast and sophisticated communications menu.

We are told, in essence, that the 21st Century motto of consumers will mimic the slogan of cable's most successful music video channel: "I want my HDTV."

It is with such highly optimistic predictions before us, then, that we have made a series of difficult judgments about how HDTV can become a reality in this country. Our principles, as I said in April, are clear: We must ensure the ultimate return of the 6 MHz "conversion channel" for HDTV to the public domain--- which means that we must be true to a firm termination schedule for the end of old-style television. Our task is formidable: The Commission must strike a balance between moving the conversion process briskly toward the conversion date, on the one hand, and giving broadcasters the flexibility they need in the interim to respond to uncertain consumer demand, to evolving program availability and to changing equipment costs. The stakes are high. These decisions promise to alter forever are changing the face of an industry that enters virtually every home in America. Small wonder that much of the world is watching our grand experiment.

Because the Commission wants HDTV to succeed, our action today demonstrates greater balance and flexibility than some might have expected:

* We grant eligible licensees an additional year, for example, to apply for an HDTV construction permit, and we add considerable flexibility to the construction deadlines.

* We suspend the dual network rule, and we set no deadline for the ultimate conversion of local production facilities to high-definition equipment--- meaning that stations can operate as "pass-through" facilities for an indefinite period.

* In addition, we take significant steps to accommodate the unique needs and financial problems of noncommercial stations.

We also adopt a phased-in simulcasting requirement, with the target for 100 percent simulcasting set now for the ninth year after the HDTV process begins. In April, I underscored the need to require that simulcasting begin at the earliest possible date. Any other approach, in my view, would clash with our ultimate commitment to reclaim the reversion channel. I would prefer, therefore, that the Commission today set an earlier date for 100 percent simulcasting of HDTV programming on the NTSC channel. Specifically, I would have preferred a deadline as early as the sixth year of the process, when, presumably, many stations will just be signing on the air with HDTV capability. Under such a policy, stations would feel a greater incentive to apply and construct earlier, and the Commission's ability to reclaim the reversion channel would be strengthened. For those reasons, I am uneasy about the approach we take today--- 50 percent simulcasting by year seven, 100 percent by year nine. The policy the Commission adopts today is scheduled for review in 1999, however, and I trust that future Commissions will not hesitate to adjust it if that appears to be warranted.

I find much that is appealing in today's action, however: the possibility, for example, that broadcasters might explore the outer limits of advanced television by developing yet-unimagined services on their HDTV channels. We are specifically asking broadcasters to comment on ancillary uses for their HDTV spectrum once their stations are on the air with a high-definition signal. Through compression and other advanced technologies, broadcasters might find a number of creative, profitable uses for their conversion channels. I hope that industry will provide us with its best thinking about these possibilities, and that the Commission will consider a flexible-use approach to HDTV spectrum in the future.

Finally, a cautionary note. In my view, the HDTV planning process will not be complete until we confront soberly a prospect that is now almost unthinkable: the possibility that, for whatever reason, this new form of television may not succeed in the marketplace. The Commission today begins to face that possibility by providing several checkpoints along the path to conversion. At each of those points, future Commissions will be better able to ensure that today's judgments, if they are shown to be misguided, can be reversed. But how, specifically, might those future Commissions make their way back if NTSC proves to be more resilient than we now assume? I do not believe that we doom HDTV's ultimate success simply by asking that question. Wise generals plan not only for triumph, but for possible retreats. I believe our public interest obligations require that we begin

to think realistically about what happens if the campaign should bog down in the marketplace.

Some suggest that we should allow broadcasters to hold both their HDTV and NTSC channels for 15 years and, at the end of the day, elect which one to surrender. I reject this approach. It encourages the warehousing of spectrum and may deter broadcasters from throwing themselves fully into the conversion process. However, I do believe that we need to come to grips with the fact that markets are unpredictable: that consumers may derail even the best efforts of the industry and the Commission to make HDTV the nation's next--- and only--- television technology.

I believe, in short, that we must pose the "what if" question in a straightforward way as we approach the actual HDTV launch date, and that we must begin to make contingency plans that preserve the FCC's options without hobbling the conversion process.

# # #

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 92-1465

In re Complaint of

David Berkman

against

Radio Station WISN(AM)
Milwaukee, Wisconsin

E R R A T U M

Released: October 23, 1992

The Memorandum Opinion and Order, FCC 92-414, in the above captioned proceeding released September 14, 1992, is corrected to change the adopted date to "August 28, 1992."

FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 92-442
Washington, D.C. 20554

In the Matter of	)	
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
	)	
Petition for Waiver of the Transport Rules filed by GTE Service Corporation	)	
	)	

REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: September 17, 1992 Released: October 16, 1992

Comment Date: December 18, 1992
Reply Comment Date: January 21, 1993

By the Commission: Commissioners Quello, Marshall, Barrett, and Duggan issuing separate statements.

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I. Introduction

1. The rate structure and pricing of switched transport are the keystone of a regulatory structure designed to promote competition for interstate switched transport and interexchange service and to encourage efficient use of the access network, thereby promoting economic investment and innovation. The current rate structure, under the "equal charge" rule, has promoted significant inefficient use of local exchange carrier (LEC) networks by interexchange carriers (IXCs) and other access customers. The uneconomic pricing signals created by the equal charge rule have caused wasteful use of LEC facilities and higher rates for ratepayers. For this reason, it is critical that we adopt a new rate structure that will better match LEC transport rates and costs.

2. Moreover, the equal charge rate structure cannot remain in place if customers are to receive the benefits of switched transport competition. In a companion docket, we propose rules for expanded interconnection for switched transport that will facilitate the ability of competitive access providers (CAPs) to compete with the LECs in the provision of switched transport. Even without expanded interconnection, LECs are already facing access competition, for example, as reflected in the proliferation of "closet POP" arrangements.[1] A rate structure change is necessary to promote more efficient use of LEC networks, and access competition.

3. We must, however, proceed cautiously in this area in order to ensure that we do not endanger the availability of pluralistic supply in the interexchange market. We are, therefore, taking an interim approach, prescribing a rate structure and establishing pricing rules to govern transport charges for two years, beginning on or about November 1, 1993. We also initiate a Further Notice of Proposed Rulemaking focusing on what long-term rate structure and pricing approach will be most reasonable in what will likely become, given the Commission's expanded interconnection policies, an increasingly competitive environment. In this context, we also seek comment on several other issues related to transport service. For example, we seek comment on which costs initially recovered through a new transport interconnection charge[2] are related directly to the use of tandem switches and therefore should be recovered through a separate charge. We also ask parties to address ways of reducing the interconnection charge. In addition, we seek comment on the DS3-to-DS1 relationships in transport rates.

II. Background

4. In August 1991, the Commission issued an Order and Notice of Proposed Rulemaking addressing the transport rate structure.[3] The Commission concluded that the "equal charge per unit of traffic" rule, which was originally mandated by the Modification of Final Judgment (MFJ) for the Bell Operating Companies (BOCs), should be changed, and proposed a more cost-based transport rate structure and pricing plan. The Commission required LECs to maintain the equal charge rate structure pending further agency action.[4] The Commission also instituted this proceeding on transport rate structure and pricing issues. The Commission adopted a set of goals to be used in

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[1] A "POP" is an IXC's point of presence. With "closet POPs," access customers purchase flat-rate special access from CAPs or LECs and avoid paying a part of the LECs' per-minute transport rate. See note 183, infra.

[2] See Section III.B. below. The interconnection charge is one of four rate elements in the interim rate structure we adopt here.

[3] Transport Rate Structure and Pricing, CC Docket No. 91-213, Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 5341 (1991) (Notice).

[4] The MFJ rate structure requirement, itself intended as an interim measure, expired on September 1, 1991.

evaluating transport issues, proposed a new transport rate structure, and sought comment on proposed pricing rules. Declining to institute a comprehensive reform of the access charge regime or a re-evaluation of jurisdictional separations, we tentatively concluded that we can, and should, implement a transport rate structure before completing such a comprehensive review.[5]

III. Interim Transport Rate Structure and Pricing

A. Overview

5. In deciding transport rate structure and rate level issues, we have focused on how best to achieve our three goals in this proceeding: (1) encouraging efficient use of transport facilities by allowing pricing that reflects costs; (2) adopting a rate structure conducive to full and fair interexchange competition; and (3) avoiding interference with the development of interstate access competition. Thus, in making our decision, we have considered equity as well as efficiency. We conclude that the interim rate structure and pricing approach that we adopt here best balances our goals at this time. In the short term, this approach is an improvement over the equal charge rate structure because it promotes more efficient use of LEC networks, and it allows us to begin implementation of expanded interconnection for switched transport.

6. The interim rate structure consists of four rate elements.[6] A flat-rate entrance facilities charge will cover transport from the IXC POP to the serving wire center (SWC).[7] A flat-rate direct-trunked transport

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[5] Notice, 6 FCC Rcd at 5348, para. 37.

[6] See Appendix A for Diagrams 1 and 2 illustrating the interim rate structure.

[7] For purposes of our discussions in text, the SWC is the LEC central office designated by the LEC to serve the geographic area in which the IXC POP is located. "Entrance facilities" denotes transport from the IXC POP to the SWC. "Direct-trunked transport" refers to transport from the SWC to the end office on dedicated facilities, without switching at the tandem. "Tandem-switched transport" refers to transport from the SWC to the end office that includes switching at a tandem. See Diagram 3 in Appendix A. Formal definitions of these terms are found in the rule changes in Appendix D, in §§ 69.110, 69.111, and 69.112.

The circuits and equipment used for transport may be dedicated to the use of a single IXC (dedicated transport), used in common by multiple IXCs (common transport), or a combination of the two. Both entrance facilities and direct-trunked transport are dedicated transport. Tandem-switched transport consists of a dedicated transport link from the SWC to the tandem (although this dedicated link will not exist if the SWC and the tandem are located in the same place) and a common transport link from the tandem to the end office, plus tandem switching. Diagrams 4 and 5 in Appendix A illustrate

element will apply for transport from the SWC to an end office for traffic requiring no tandem switching. A usage-based tandem-switched transport element will apply for transport from the SWC to an end office of traffic that is switched at a tandem. The tandem-switched transport element will include both an interoffice transmission charge and a tandem charge. The tandem charge will initially recover twenty percent of the current Part 69 tandem revenue requirement. Finally, a usage-based interconnection charge will be paid by all interstate access customers that interconnect with the LEC switched access network. With limited exceptions,[8] all LECs are required to implement this new rate structure on or about November 1, 1993.

7. Under the interim rate structure, the LECs will be permitted, but not required, to charge distance-sensitive rates for entrance facilities, direct-trunked transport, and tandem-switched transport. In applying distance-sensitive rates, we require the LECs to measure mileage for both direct-trunked and tandem-switched transport as airline mileage between the SWC and the end office.

8. We also here adopt rules establishing a presumption of reasonableness for initial rates under the interim rate structure that are based on special access rates consistent with a DS3-to-DS1 ratio of at least 9.6 to 1. Entrance facilities charges will be presumed reasonable if based on the special access channel termination charges for equivalent voice grade, DS1, and DS3 special access services. Direct-trunked transport charges will be presumed reasonable if based on the interoffice charges for equivalent voice grade, DS1, and DS3 services. Tandem-switched interoffice transmission charges will be presumed reasonable if set at a per-minute equivalent of the voice grade, DS1 and DS3 rates for direct-trunked transport, weighted to reflect the LEC facilities between the tandem and end office used in the provision of tandem-switched transport. Rate relationships above the 9.6 to 1 benchmark will be presumptively lawful, whereas rate relationships below the benchmark will generally be suspended and investigated in the absence of a "substantial cause" showing. We also adopt modified price cap rules for price cap LECs, as well as new pricing rules for rate-of-return carriers, to govern changes in transport rates during the interim two-year period.

9. Our interim transport regime will remain in place through October 31, 1995, when it will be replaced by long-term rate structure and pricing

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the concepts of dedicated and common transport. Appendix A also contains Diagrams 6 and 7, which illustrate the unbundled three-part rate structure described infra in Section VII.A.

[8] As explained in Section V below, we do not require FCC-approved centralized equal access providers or LECs participating in such arrangements to make any change in their rate structures or pricing, except to offer entrance facilities on a flat-rate basis. In addition, if a LEC lacks recording facilities to bill for direct-trunked transport at certain end offices, it must adopt the interim rate structure, but is not required to provide direct-trunked transport to and from such end offices.

rules adopted after we receive comment on the Further Notice of Proposed Rulemaking. We conclude that two years is a reasonable time period for the interim rate structure. A shorter time period would be disruptive to the industry because it would require the LECs and IXCs to adjust to two sets of transport changes within a short timeframe. For the longer term, we seek comment on what rate structure and pricing approach would be most appropriate in an increasingly competitive access environment.

10. It is not clear at present, however, how we should best balance our three goals in this proceeding in the longer term, given the increasingly competitive access environment contemplated by our expanded interconnection policies. Therefore, the Further Notice of Proposed Rulemaking seeks comment on what long-term transport rate structure and pricing approach we should take.

11. CompTel, MCI, and Ad Hoc claim that the Commission lacks sufficient cost data to make any rate structure and pricing decisions at this time. We disagree. As explained in more detail below, the record provides ample support for adoption of our interim transport rate structure and pricing plan. Moreover, the data submitted by the LECs provide us with sufficient information to conclude that the impact of our interim plan on medium and small IXCs is likely to be minimal. These parties appear to argue that we should have perfect information about underlying costs and impacts on individual IXCs before moving forward. We conclude that a full tariff investigation is not necessary in order to resolve the issues that parties have raised regarding existing special access rates. Moreover, such an investigation would be time consuming and administratively burdensome, and would delay replacement of existing transport rates with more reasonable and cost-based transport rates.[9] Individual IXC impact analyses would also delay a new transport rate structure because they would require hundreds of LECs to produce individual analyses for hundreds of IXCs. Further, these

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[9] We further note that in the Commission's price cap decision, we found that such a broad cost investigation would be administratively burdensome, with no guarantee of producing substantially different rates. In the AT&T Price Cap Order, the Commission rejected arguments that a detailed rate investigation was necessary before price cap regulation could be implemented. The Commission noted that the rates derived in the course of a rate case would not necessarily be driven by economic efficiency, but would more likely reflect the costing methodology employed. The Commission concluded that "[a] rate case, in our judgment, would be administratively burdensome, and possibly time consuming process, with no guarantee of results that are substantially different from (let alone lower than) existing rates." As an illustration of the difficulties of rate cases, the Commission noted that a 1969 proceeding (Docket 18128) initiated to establish ratemaking principles based on historical cost causation for the Bell System never resulted in the use of such a methodology. Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice, 4 FCC Rcd 2873 (1989), at note 22, and para. 427, and Erratum, 4 FCC Rcd 3379 (1989) (AT&T Price Cap Order), modified on recon. 6 FCC Rcd 665 (1991), appeal docketed, AT&T v. FCC, No. 91-1178 (D.C. Cir. April 15, 1991).

analyses are unlikely to produce greater accuracy because IXCs make their own decisions about how best to structure their networks and keep their costs down, and LEC impact analysis cannot possibly predict every such decision accurately.

12. As discussed above, the current equal charge rule has significant negative implications for both efficient use of the network and the possibility of local access competition. Thus, moving to an improved rate structure clearly serves the public interest. We are taking a cautious approach, adopting an interim rate structure today, and seeking further comment on what long-term rate structure would best serve the public interest. The rate structure we adopt is very similar to the one proposed by CompTel, and significantly lessens the impact on small IXCs.

13. All parties acknowledge that special access and switched transport use the same underlying facilities, except for switches. Our choice of special access rates as the basis for transport rates is based on the costs of facilities ordered by customers. As discussed below,[10] we do not think that the DS3-based pricing proposed by some parties is reasonable as an interim measure. We have sufficient information from the LEC modeling runs to have confidence that the impact of this interim rate plan on small IXCs is likely to be minimal. In addition, the one-year period needed for implementation is more than enough time to enable small IXCs to adjust to the introduction of the interim rate plan.

14. The record before us provides a sound basis for an improved transport rate structure, particularly as we are moving cautiously and adopting an interim approach. Especially given the one-year lead time necessary to implement the new rate structure, delay would continue inefficient use of the network and postpone the benefits of local transport access competition. As a result, consumers would face unnecessarily high rates. Therefore, we conclude we should move forward now to adopt the interim rate structure and pricing approach detailed below.

B. Rate Structure

1. Background

15. The rate structure proposed in the Notice consisted of: (1) a flat-rate dedicated transport charge to cover transport facilities dedicated to the use of a single IXC; (2) a usage-based common transport charge for transport facilities used by multiple IXCs; and (3) a usage-based interconnection charge applied to all LEC switched access customers, including CAPs, interconnecting with the LEC switched access network pursuant to provisions for expanded interconnection.[11] The Commission also sought

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[10] See paras. 45-49, infra.

[11] Notice, 6 FCC Rcd at 5344-5345, paras. 15-16.

comment in the Notice on the extent to which the proposed rate elements should be distance-sensitive.[12]

2. Comments

16. Most Tier 1 LECs support the Notice rate structure proposal for transport, stating that it satisfies the Commission's goals in this proceeding.[13] Several LECs interpreted the proposal for a flat-rate dedicated transport charge as encompassing two flat-rated links: a flat charge for the IXC-POP-to-SWC link and a separate flat charge for the link from the SWC to the end office or tandem.[14]

17. CAPs such as Teleport and ALTS support the Notice proposal, although Teleport Denver objects to the use of distance-sensitive rates.[15] AT&T argues for a cost-based rate structure with tandem-switched transport alone bearing any additional costs attributable to it, such as the cost of the tandem switch, and opposes the establishment of a long-term interconnection charge.[16] Medium and small IXCs, including MCI, Sprint, and CompTel, generally oppose the Notice proposal, claiming that it could harm interexchange competition.[17] These parties argue that if the tandem is a relevant measurement point for calculating the mileage charges paid by common

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12 Fifty-one parties filed comments and forty-two parties filed reply comments in this proceeding. A list of these parties is contained in Appendix B.

13 US West Comments at 5; CBT Comments at 3-4; USTA Comments at 3; NYNEX Comments at 5-8; SWBT Comments at 2-3; Rochester Comments at 8; GTE Comments at 2; Pacific Comments at 3, 12, 23-25; BellSouth Comments at 8; United Telephone System Companies Comments at 3-6; Ameritech Comments at 9; GTE Reply at 4; and Pacific Reply at 4.

14 See, e.g., Ameritech Comments at 10; SWBT Comments at 26. The other BOCs and GTE also endorse this approach.

15 Teleport Comments at 10; ALTS Comments at 1; Teleport Denver Comments at 3. MFS originally supported the rate structure proposed in the Notice. See ex parte letter from Cindy Z. Schonhaut, Director of Legislative and Regulatory Affairs, MFS, to Donna R. Searcy, Secretary, FCC, filed June 26, 1992. See also Petition for Rehearing or Clarification of Metropolitan Fiber Systems of New York, Inc. re. Opinion No. 91-13 in NYPSC Case 28425 (June 26, 1992), at pp. 21-22. Subsequently, MFS changed its position and stated that it is neutral with respect to the rate structure proposals in this proceeding. Ex parte letter from Cindy Z. Schonhaut, Director of Legislative and Regulatory Affairs, MFS, to Donna R. Searcy, FCC, filed July 21, 1992.

16 AT&T Comments at 3, 12-13.

17 Sprint Comments at 4-9; CompTel Comments at 31-37; MCI Comments at 2, 9.

transport users, LEC decisions regarding tandem placement and deployment could increase small IXCs' transport rates. WilTel argues that IXCs using tandem-switched transport have to connect to over 700 tandems, 323 owned by the BOCs and 390 owned by independent telephone companies, to provide ubiquitous service throughout the country.[18] WilTel and some other smaller IXCs also argue that the LEC tandems do not always efficiently aggregate interstate traffic.[19] They argue that they may face unnecessarily high common transport charges in connecting separately to every tandem in order to provide ubiquitous service, because they would have to buy numerous low volume links rather than a few higher volume links. The LECs, however, challenge WilTel's argument. A number of LECs assert that they have not deployed an excessive number of tandems, and that their tandems maximize the efficiency of the network overall.[20] Ameritech argues that the higher transport costs that would result in some areas are caused by low access usage in sparsely populated areas, not by the deployment of multiple tandems.[21] In addition, medium and small IXCs object to paying two separate charges for tandem-switched transport, a flat-rate charge for the dedicated link between the SWC and tandem, and a second per-minute charge for traffic carried on common circuits between the tandem and the end offices.[22]

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[18] On June 11, 1992, WilTel filed a Petition for Expedited Rulemaking, which it also filed as an ex parte letter in this docket. WilTel requests that the Commission begin a rulemaking to consider: (1) requiring LECs to transmit certain signalling information needed to permit competition for tandem-switched transport; and (2) regulating LEC tandem deployment. Ex parte letter from Peter A. Rohrbach, Attorney, WilTel (Petition for Expedited Rulemaking), to Donna R. Searcy, Secretary, FCC, filed June 11, 1992. See Section VII.A., infra.

[19] WilTel Petition at 17-31; ex parte letter from Don Detampel, President, Schneider Communications, to Donna R. Searcy, Secretary, FCC, filed May 22, 1992; ex parte letter from Danny E. Adams, Attorney, LDDS Communications, to Donna R. Searcy, Secretary, FCC, filed July 7, 1992.

[20] Ex parte letter from Fred Konrad, Director-Federal Relations, Ameritech, at 8-10, to Donna R. Searcy, Secretary, FCC, filed July 8, 1992; ex parte letter from W. W. Jordan, Director-Federal Regulatory, BellSouth, at 2-5, to Donna R. Searcy, Secretary, FCC, filed July 8, 1992; ex parte letter from Jo Ann Goddard Riley, Director, Federal Regulatory Relations, Pacific, at 4-7, to Donna R. Searcy, Secretary, FCC, filed July 17, 1992; ex parte letter from William A. Blase, Jr., Director-Federal Regulatory, Southwestern Bell, at 1-2, to Donna R. Searcy, Secretary, FCC, filed on July 10, 1992.

[21] Ex parte letter from Fred Konrad, Director-Federal Relations, Ameritech, at 5-7, to Donna R. Searcy, Secretary, FCC, filed July 8, 1992.

[22] CompTel Comments at 22-30; WTC Comments at 20-30; Metromedia Comments at 7-9; Metromedia Reply at 2-4; Schneider Comments at 8-9; Sprint Reply at 6-7.

18. Although CompTel argues that cost studies should be conducted, it also proposes an alternative rate structure. Under CompTel's proposal, transport users would pay a flat-rate charge for the entrance facilities between the IXC POP and the SWC, and either an end-to-end per-minute rate for transport between the SWC and the end office, or a flat-rate charge for transport of traffic between the SWC and end office. Mileage for both flat-rate and usage-sensitive transport would be measured as airline mileage from the SWC to the end office. CompTel proposes minimal distance sensitivity for these charges.[23] Although CompTel initially proposed that no tandem costs be imposed on users of usage-sensitive transport, it subsequently acknowledged that those IXCs use the tandem switch and it may therefore be appropriate for them to bear some of its costs.[24] In its reply comments, MCI criticizes the CompTel rate structure and pricing proposal as encouraging excessive use of tandem-switched transport.[25] Subsequently, in a joint statement filed by several IXCs, MCI indicates support for CompTel's proposal.[26]

19. Many of the commenters oppose implementation of the Part 69 rate structure rules, but virtually all focus their criticism on rate levels under the Part 69 cost allocation rules, rather than on the dedicated/common transport rate structure itself. Only two parties, Allnet and the Small Business Administration, advocate continuation of the equal charge rate structure.[27] They argue that the equal charge rule promotes interexchange competition, and is easier to administer. They also state that the equal charge rule is the best rate structure for transport because the true costs of transport are unknown.[28] In addition, NARUC and the DC PSC express concern that the introduction of dedicated transport will cause a shift away from interstate tandem usage, resulting in increased allocation of tandem investment to the intrastate jurisdiction.[29]

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23 CompTel Comments 37-40.

24 Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed May 28, 1992. See also ex parte letter from Danny E. Adams, Attorney, LDDS Communications, to Donna R. Searcy, Secretary, FCC, filed July 7, 1992.

25 MCI Reply Comments at 27.

26 Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed August 11, 1992.

27 As between the proposal in the Notice and the rate structure proposed by CompTel, however, Allnet favors the CompTel proposal. Ex parte letter from Roy L. Morris, Director, Allnet, to Donna R. Searcy, Secretary, FCC, filed July 10, 1992.

28 Allnet Comments at 4-5; SBA Comments at 25-26.

29 DC PSC Comments at 6; NARUC Comments at 5. See also California PUC Comments at 7-8.

3. Discussion

20. As commenters have noted, the equal charge rate structure gives the IXCs little or no incentive to order and use LEC trunking facilities efficiently, with some LECs arguing that twenty-three to fifty-nine percent of transport trunks in service may not be necessary to support network usage.[30] Assuming that one dedicated transport facility costs approximately $960 and that forty-one percent of these dedicated transport facilities are overprovisioned today,[31] AT&T has estimated that the benefit to consumers resulting from cost-based pricing and competition would be close to $1 billion annually.[32] We find that the record demonstrates that continuing the equal charge rule indefinitely would result in unjust and unreasonable rates. A new rate structure and pricing approach that is more consistent with the way the costs of transport facilities are incurred is needed to promote efficient use of the network. We conclude that adopting the interim rate structure and pricing plan for a two-year period will better serve our goals than would continuing the equal charge rule. The interim rate structure represents a reasonable first step for that period while we further consider, in the Further Notice of Proposed Rulemaking, what cost-based rate structure is most reasonable in the longer term, given an increasingly competitive access environment.

21. We are requiring the LECs to impose a flat-rate entrance facilities charge. The parties generally support such a charge. A flat-rate charge is appropriate because the entrance facilities are dedicated to the sole use of one IXC and, therefore, that IXC should bear the full cost of the facilities.[33] By adopting a charge for entrance facilities separate from the charge for interoffice facilities, the interim rate structure recognizes that the entrance facilities and the interoffice network may have different engineering and economic characteristics. In addition, a separate entrance facilities charge will easily allow for expanded interconnection at the SWC. Since transport for the entrance facilities and the interoffice network will be paid for in two separate charges, IXCs can readily purchase one of the

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30 See Ameritech Comments at 16-17, filed February 22, 1991 and NYNEX Reply Comments at 17, n. 39, filed March 22, 1991, in CC Docket No. 78-72.

31 See Ameritech Comments at 16-17, CC Docket Nos. 78-72 and 91-213, filed February 22, 1991; NYNEX Reply at 17, CC Docket Nos. 78-72 and 91-213, filed March 22, 1991.

32 Ex parte letter from Thomas H. Norris, Corporate Vice President, Federal Regulation Division, AT&T, to Donna R. Searcy, Secretary, FCC, filed July 23, 1992; ex parte letter from Paul Malandrakis, Federal Regulatory Affairs, Regulatory Director, AT&T, to Donna R. Searcy, Secretary, FCC, filed August 27, 1992.

33 See, e.g., ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed April 10, 1992; ex parte letter from Don Detampel, President, Schneider Communications, to Donna R. Searcy, Secretary, FCC, filed May 22, 1992.

links from the LEC and the other from a CAP if the Commission adopts its proposal for expanded interconnection for switched transport. Moreover, applying two separate charges -- one for the entrance facilities and one for the interoffice segment -- is consistent with the way in which special access facilities are priced today.

22. We also conclude that the interim transport rate structure should include a flat-rate charge for direct-trunked transport, with mileage measured as airline mileage from the SWC to the end office.[34] A flat rate for this link reflects the way that costs are incurred, because the circuits are dedicated to the use of one IXC.[35] Furthermore, if the Commission proceeds with its expanded interconnection proposal for switched transport, use of flat rates is more conducive to the development of competition in the switched transport marketplace. Since CAPs are likely to offer flat-rate service, allowing the LECs to implement flat rates will bring the benefits of competition to more ratepayers.[36]

23. Most IXCs and LECs acknowledge that users of tandem-switched transport use the tandem switch while users of direct-trunked transport do not.[37] Accordingly, the interim rate structure includes a per-minute tandem charge as part of the tandem-switched transport element to recover the costs

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[34] The interoffice charge for direct-trunked transport will contain a nondistance-sensitive component recovering the costs of the circuit equipment at the ends of the interoffice links, and, if the LEC chooses to have distance-sensitive rates, a distance-sensitive component covering the transmission facilities between the end points of the interoffice link. See notes 84 and 85, infra.

[35] See, e.g., ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed April 10, 1992; ex parte letter from Thomas H. Norris, Corporate Vice President, Federal Regulatory Division, AT&T, to Donna R. Searcy, Secretary, FCC, filed July 17, 1992.

[36] See Expanded Interconnection with Local Telephone Company Facilities and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 91-141, Transport, Phases I & II and CC Docket No. 80-286, Second Further Notice of Proposed Rulemaking, FCC 92-441 (adopted September 17, 1992) (Transport Expanded Interconnection Notice).

[37] See, e.g., ex parte letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, March 13, 1992; ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed May 28, 1992; ex parte letter from Paul Malandrakis, Regulatory Director, Government Affairs, AT&T, to Donna R. Searcy, Secretary, FCC, filed February 6, 1992.

of the tandem incurred in the provision of tandem-switched transport.[38] If the transport rate structure is to be cost-causative and thereby encourage efficiency, tandem-switched transport users should be required to pay for the tandem features and functions that they use. Otherwise, the rate structure would encourage more tandem use than would be economically efficient and would, because of regulatory pricing policy, preclude effective competition in the provision of tandem-switched transport. Accordingly, we conclude that the tandem-switched transport element should consist of two subelements, an interoffice transmission charge,[39] and a tandem charge that recovers the costs of the tandem.

24. Some parties argue that it is premature to require any tandem charge because the costs of the tandem switch are not known.[40] The interstate costs of access tandem switches, however, can be derived from our current rules. The cost allocation process begins with our accounting rules, in Part 32 of Title 47 of the Code of Federal Regulations.[41] Tandem switch investment is recorded in the central office switching accounts, which for larger carriers are broken down into analog electronic switches, digital electronic switches, and electro-mechanical switches.[42] The next step is the separations process, governed by Part 36 of our rules. All tandem switch costs are put into one separations category, which is called Central Office Equipment (COE) Category 2.[43] The costs are then split between the state and interstate jurisdictions in proportion to relative state and interstate minutes of use.[44] After separations, the interstate costs are put into the appropriate access categories, as governed by Part 69 of our rules. Tandem switching costs are assigned to transport, except for a very small amount.[45]

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38 As discussed below, we decide that the initial tandem charge should recover twenty percent of the Part 69 tandem revenue requirement. See paragraphs 24 and 25, infra.

39 As with direct-trunked transport, this interoffice charge will contain a nondistance-sensitive component and may contain a distance-sensitive component. See para. 43 and notes 84 and 85, infra.

40 Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed May 28, 1992.

41 47 C.F.R. § 32.1-32.9000.

42 47 C.F.R. §§ 32.2210 (central office switching), 32.2211 (analog electronic switching), 32.2212 (digital electronic switching), and 32.2215 (electro-mechanical switching).

43 47 C.F.R. § 36.124 (tandem switching equipment category 2).

44 Id.

45 47 C.F.R. § 69.306(c). The remainder is associated with corridor services permitted by the MFJ and assigned to the interexchange category. Expenses generally follow investment in both Part 36 and Part 69. See 47

Thus, it is easy to trace tandem switching costs through the cost allocation process.

25. We solicited comment from parties regarding the composition of the current tandem revenue requirement. The record reveals that, at the moment, most SS7-related costs are accounted for in the way that we have just described for tandem switching costs.[46] For example, NYNEX classifies various SS7 costs as digital electronic switching (account 2212), and then as tandem switching for the separations process.[47] As a result, these SS7 costs are part of the current tandem revenue requirement. These SS7 facilities, however, are used to provide services such as out-of-band signalling for SS7 call set-up. The SS7 equipment sets up calls for both direct-trunked and tandem-switched transport, and therefore should be recovered from all transport users.[48] These SS7-related costs are estimated to represent no more than approximately ten percent of the total tandem revenue requirement.[49] Except for SS7 costs, parties have not presented any other information indicating that the tandem revenue requirement includes other costs unrelated to tandem-switched transport. In order to ease the impact of a rate structure change on small IXCs, however, we prescribe that the tandem element initially recover only twenty percent of the current tandem revenue requirement, with the remainder of the revenue requirement recovered through the interconnection charge, and find that such a rate is just and reasonable. The Further Notice we adopt today seeks to refine further the composition of the tandem revenue requirement and to determine how tandem costs should be phased into the tandem charge.

26. Although the parties agree on many aspects of the rate structure, there is disagreement on some aspects of the rate structure for tandem-switched transport. Most LECs, some CAPs, and AT&T support the rate structure proposed in the Notice, under which users of tandem-switched transport would pay both a per-minute rate for the common transport link and

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C.F.R. §§ 36.321 and 69.401.

[46] See, e.g., ex parte letter from Marie T. Breslin, Director - Federal Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, filed March 13, 1992; ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992.

[47] Ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992.

[48] SWBT Comments at 21; WTC Reply at 39-40; ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992.

[49] See, e.g., ex parte letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, filed March 13, 1992; ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992.

a flat-rate for the dedicated link from the SWC to the tandem.[50] Small and medium IXCs, however, support an end-to-end per-minute charge for tandem-switched transport from the SWC to end office, with mileage measured as airline mileage directly from the SWC to the end office.[51] We are adopting an interim rate structure with an end-to-end per-minute charge for tandem-switched transport based on mileage from the SWC to the end office.

27. Commenting on the rate structure proposed in the Notice, small and medium IXCs have raised a number of issues. For instance, some have questioned the effect of LEC tandem provisioning decisions on transport rates under the rate structure proposed in the Notice.[52] One issue is the way in which mileage is measured for tandem-switched transport. Under the equal charge rule, the mileage to the tandem has not affected rates paid by IXCs. Under the three-part rate structure, mileage for tandem-switched transport would be measured from the SWC to the tandem, and from the tandem to the end offices subtending that tandem. Thus, because the tandem is a measurement point, tandem-switched transport rates would be affected by the LECs' decisions about the geographic placement of tandem switches. CompTel and other IXCs assert that such measurement is unfair to tandem-switched transport users.[53] According to these IXCs, mileage for tandem-switched transport should be measured without reference to the tandem because IXCs have no control over LEC decisions on tandem placement and because LEC tandems do not always efficiently aggregate interstate traffic. They also argue that in many cases, the physical routing of direct-trunked transport may parallel the routing of tandem-switched transport, passing through the tandem office, or may pass through some other intermediate LEC office.

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[50] Teleport Comments at 10; USTA Comments at 4; NYNEX Comments at 5-8; Pacific Comments at 3; BellSouth Comments at 8; SWBT Comments at 2; GTE Comments at 2; ex parte letter from Kenneth Rust, Director, NYNEX, Federal Regulatory Matters, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, filed March 13, 1992; ex parte letter from Anthony Alessi, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992.

[51] See, e.g., CompTel Comments at 37-40.

[52] Ex parte letter from Don Detampel, President, Schneider Communications, to Donna R. Searcy, Secretary, FCC, filed May 22, 1992; ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed April 10, 1992.

[53] Teledial Comments at 1-2; TMA Comments at 1-4; SP Telecom Comments at 1-2; Sprint Reply at 6; CNI Reply at 6; Metromedia Comments at 1; ATX Comments at 1; Schneider Comments at 3; CompTel Comments at 31-37; Schneider Comments at 5-8; ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, April 10, 1992; ex parte letter from Leon M. Kestenbaum, Vice President-General Regulatory, Sprint, to Donna R. Searcy, Secretary, FCC, filed April 8, 1992.

28. According to a number of parties, however, the rate structure advocated by small and medium IXCs has some disadvantages, especially in the longer term.[54] For instance, these parties state that a bundled tandem-switched transport rate precludes tandem interconnection and competition, thus inhibiting CAPs from competing for anything but entrance facilities or total end-to-end transport, since the SWC-to-tandem and tandem-to-end office links will be offered by the LECs through a bundled per-minute charge.[55] Furthermore, Teleport asserts that tandem-switched transport should be unbundled to provide separate charges for the SWC-to-tandem and tandem-to-end office links, thereby allowing CAPs to compete for each of the unbundled transport links. Finally, Teleport states that the SWC-to-tandem link is a dedicated facility and should be priced based on special access, thus reflecting fully the way costs of transport facilities are incurred.[56]

29. The importance and difficulty of these issues leads us to conclude that further inquiry is needed on what rate structure is most appropriate for the long-term in an increasingly competitive access environment. In the meantime, we adopt an interim rate structure with a per-minute charge for tandem-switched transport between the SWC and end office as a reasonable first step toward a cost-based, more rational rate structure. Adopting this interim rate structure for a two-year period will better serve our goals than would continuing the equal charge rule.[57] The interim rate structure will

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[54] Ex parte letter from Richard M. Singer, Attorney, Teleport, to Donna R. Searcy, Secretary, FCC, filed September 10, 1992. See also ex parte letter from Thomas H. Norris, Corporate Vice President, Federal Regulatory Division, to Donna R. Searcy, Secretary, FCC, July 17, 1992; ex parte letter from Anthony M. Alessi, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, March 12, 1992; ex parte letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, filed March 13, 1992.

[55] Ex parte letter from Richard M. Singer, Attorney, Teleport, to Donna R. Searcy, Secretary, FCC, filed September 10, 1992. See also ex parte letter from Thomas H. Norris, Corporate Vice President, Federal Regulatory Division, to Donna R. Searcy, Secretary, FCC, July 17, 1992; ex parte letter from Anthony M. Alessi, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, March 12, 1992; ex parte letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, filed March 13, 1992.

[56] Ex parte letter from Richard M. Singer, Attorney, Teleport, to Donna R. Searcy, Secretary, FCC, filed September 10, 1992.

[57] In its petition for rulemaking, WilTel requests that the Commission start a rulemaking to consider regulating LEC deployment of tandems and requiring LECs to provide signalling to customers interested in competing in the provision of tandem-switched transport service. We grant WilTel's petition in part insofar as we seek comment on tandem placement issues below

allow us to achieve some of the efficiency and access competition benefits of the Notice proposal while allowing us to further consider tandem placement issues. Under the interim rate structure, the LECs will be required to offer a tandem-switched transport charge that consists of a per-minute rate with mileage measured as airline mileage from the SWC to the end office if the LEC chooses distance-sensitive rates for tandem-switched transport. This will alleviate concerns raised by the small IXCs regarding mileage measurement and tandem deployment. The use of flat-rate entrance facilities should encourage IXCs to make more efficient decisions about use of the LEC network than under the equal charge rule. The interim rate structure will permit the LECs to offer a flat-rated direct-trunked transport service, thereby facilitating competition by allowing the LECs to offer service under a rate structure similar to the flat-rated offerings we anticipate the CAPs will make. This will bring the benefits of competition to more customers.

30. During the interim two-year period, the LECs are permitted, but not required, to have distance-sensitive charges for direct-trunked and tandem-switched transport and entrance facilities. If they do so, mileage for both direct-trunked and tandem-switched transport must be measured as airline mileage directly from the SWC to the end office. Mileage for entrance facilities must be measured as airline mileage from the IXC POP to the SWC.

31. MCI argues that because many of AT&T's POPs are collocated at LEC SWCs, distance-sensitive rates for the entrance facilities would give AT&T an unfair advantage over other IXCs that are not collocated at LEC SWCs.[58] IXCs will have one year between the adoption and implementation of the interim rate structure to reconfigure their networks, if they choose, to reduce their access costs. We are not convinced that AT&T's POP locations create an unfair advantage for AT&T. Other IXCs can take steps to reduce their mileage charges and will have at least one year to do so before there is any change in the transport rate structure. Moreover, we note that LECs may choose not to implement distance-sensitive rates for entrance facilities. Indeed, most special access channel termination charges today are not distance-sensitive.

32. In allowing the LECs to employ distance-sensitive charges for direct-trunked and tandem-switched transport, we do not specify the degree of distance-sensitivity that would be permitted for these rate elements.[59]

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in the Further Notice. We discuss the issue of signalling in the Transport Expanded Interconnection Notice, and grant Wiltel's petition with respect to this issue as well. See Transport Expanded Interconnection Notice at paras. 43-46.

58 Ex parte letter from Leonard S. Sawicki, Senior Manager, Regulatory Affairs, MCI, to Donna R. Searcy, June 11, 1992.

59 CompTel argues that rates for common and dedicated transport should reflect the same degree of distance-sensitivity as DS3 special access rates. See ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed April 10, 1992. The

The record in this proceeding demonstrates that the costs of providing transport are distance-sensitive to some extent,[60] but does not demonstrate that the degree of distance-sensitivity in existing special access rates is unreasonable as a general matter. Accordingly, we will not require the LECs to alter the distance-sensitivity of their September 1, 1992 special access rates before using them to initialize transport rates.

C. Initial Rate Levels

1. Background

33. In the Notice, we tentatively concluded that we should impose additional pricing requirements beyond the price cap rules for restructured services for setting the initial rate levels for common and dedicated transport. We proposed several options for setting the initial rates for dedicated transport, such as pricing as specified under Part 69 or at special access rates. For common transport, we again proposed a number of options, such as justifying common transport rates with the cost showings required for new services under price cap regulation, setting rates as specified in Part 69, keeping common transport rates at current equal charge levels, or setting them in relation to the per-minute cost of dedicated transport.

34. We also proposed in the Notice that the initial interconnection charge need only comply with the price cap rate restructure requirements. In other words, the interconnection charge would be priced residually as an initial matter so as to make transport charges as a whole under the new rate structure revenue neutral. For rate-of-return LECs, we proposed that the interconnection charge be computed by subtracting projected common and

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record does not support a Commission requirement that this level of distance-sensitivity be used uniformly. DS3 rates reflect the use of fiber, which is less distance-sensitive than copper. See, e.g., GTE Comments at 13; NECA Comments at 9; SWBT Comments at 17. Switched transport, however, is carried over copper as well as fiber facilities. See, e.g., US West Comments at 10; GTE Comments at 13. It would be unreasonable to require the LECs to offer transport at rates that reflect the degree of distance-sensitivity in special access DS3 rates, because that would not take into account the differences in distance-sensitivity between fiber and copper, which are both used for transport. In the longer term, a zone density pricing approach may also address some of CompTel's concerns regarding distance-sensitivity. See Transport Expanded Interconnection Notice at paras. 32-35.

[60] GTE Comments at 12-17; NECA Comments at 8-9; US West Comments at 8-12; BellSouth Comments at 17; SWBT Comments at 16-18; USTA Comments at 42-45; NYNEX Comments at 8-12. Costs varying with distance include labor, engineering, conduit, right of way, repeaters, maintenance, repair, and power. Ameritech Comments at 43; GTE Comments at 13; US West Comments at 8. Although distance-sensitivity is reduced through the use of fiber, there is still some distance-sensitivity. GTE Comments at 13; NECA Comments at 9; SWBT Comments at 17; NYNEX Comments at 9; BellSouth Comments at 17.

dedicated transport revenues from the Part 69 transport revenue requirement, and dividing by the relevant projected total minutes.

2. Comments

35. Several LECS recommend that dedicated transport rates be set at special access rates for equivalent facilities, including voice grade, DS1, and DS3 rates.[61] These LECs argue that special access-based pricing is appropriate because dedicated transport and special access use equivalent facilities. The CAPs advocate using special access rates to set dedicated transport rates, but MFS, Teleport and ALTS oppose the use of DS3 rates, arguing that they may be too low.[62]

36. AT&T and some of the smaller IXCs advocate using voice grade, DS1, and DS3 rates for dedicated transport.[63] In their initial comments in response to the Commission's proposal, a number of small and medium IXCs argue that rates should be restricted to the voice grade and DS1 levels if existing special access rates are to be used.[64] A number of LECs assert that while limiting the pricing of dedicated transport to voice grade and DS1 rates might appear to be conducive to interexchange competition, large volume transport users would be able to obtain lower rates from the CAPs, or by building their own facilities, thereby undermining both access competition and efficiency.[65]

37. MCI argues that the existing special access rates are inappropriate, and that the Commission should undertake and complete a full cost investigation to determine the costs of and appropriate prices for special access services before adopting an order on transport rate structure

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[61] Ameritech Comments at 22-23; Bell Atlantic Comments at 2-5; BellSouth Comments at 13-14; CBT Comments at 5-6; GTE Comments at 7-8; NYNEX Comments at 15-17; Pacific Comments at 17; SWBT Comments at 25-27; USTA Comments at 5; US West Comments at 6-7, 11, 15.

[62] ALTS Comments at 14-15; MFS Comments at 15; Teleport Comments at 11-13; ex parte letter from Cindy Schonhaut, Director of Legislative and Regulatory Affairs, MFS, to Donna R. Searcy, Secretary, FCC, filed August 19, 1992.

[63] AT&T Comments at 12; Metromedia Comments at 6; WTC Comments at 15; ex parte letter from Paul Malandrakis, Regulatory Director, Government Affairs, to Donna R. Searcy, Secretary, FCC, filed February 6, 1992.

[64] Sprint Comments at 32-33; Sprint Reply at 8; LiTel Comments at 5; Telephone Express Reply Comments at 4-6; One-2-One Reply Comments at 9; WTC Comments at 4-5; ex parte letter from Leon M. Kestenbaum, Vice President-General Regulatory, Sprint, to Donna R. Searcy, Secretary, FCC, filed April 8, 1992.

[65] Ameritech Comments at 24; BellSouth Comments as 12-13; GTE Comments at 8, GTE Reply at 11-13; NYNEX Comments at 18-19, 21-22, NYNEX Reply at 40.

and pricing.[66] In addition, because special access rates include volume discounts, MCI opposes allocating overhead costs in proportion to direct costs, arguing that overhead costs have no relation to the volume or direct costs of services purchased.[67] CompTel urges that DS1 rates be set at 1/28 of DS3 rates because one DS3 facility has the same transmission capacity as 28 DS1 facilities.[68] In support of its argument, CompTel argues that DS3 rates reflect the cost of fiber, while DS1 rates represent an averaged rate that reflects a mix of fiber and copper.[69] CompTel contends that it is unfair for small and medium IXCs to pay the averaged DS1 rate for DS1 facilities that they use, while large IXCs pay fiber-based rates for DS3s.[70] Several IXCs, including MCI, Sprint, and WilTel, support CompTel's rate structure and pricing proposal, and advocate setting DS1 rates based on DS3 rates.[71] These IXCs also argue that the Commission should adopt geographic deaveraging for both special and switched transport.[72] United argues that

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66 See, e.g., MCI Comments at 2-5.

67 MCI Comments at 10-12. Instead, MCI requests that overhead costs be recovered on a per-voice grade equivalent or on a per-minute basis.

68 Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed April 10, 1992. See also WIC Comments at 5.

69 See ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed August 11, 1992.

70 See ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed July 24, 1992. Subsequently, CompTel submitted an interim pricing proposal that based transport rates on a single "blended" per-circuit rate between existing DS1 and DS3 special access rates. The "blended" rate would be higher than the current rate for DS3 on a per circuit basis, but lower than the current transport rates. Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed September 5, 1992.

71 See, e.g., ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed August 11, 1992. Some small IXCs have suggested setting voice grade rates at 1/672 of DS3 rates (1/24 x 1/28). See ex parte letter from John W. Street, President, Telephone Express, to Donna R. Searcy, Secretary, FCC, filed July 15, 1992.

72 Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed August 11, 1992; ex parte letter from Leon M. Kestenbaum, Vice President-General Regulatory, Sprint, to Donna R. Searcy, Secretary, FCC, filed July 17, 1992; ex parte letter from Jay C. Keithley, Vice President, Law and External Affairs, United, to Donna R. Searcy, Secretary, FCC, filed July 17, 1992.

there are significant differences among transport routes, and that these cost differences are primarily a function of total traffic volume on the route.[73] Virtually all LECs object to pricing DS1 facilities on the basis of DS3 rates. The LECs state that such pricing does not reflect the underlying cost relationships between DS1 and DS3 facilities. Furthermore, they assert that DS3-equivalent pricing would replace one type of equal charge rule with another type of equal charge rate structure.[74] CAPs also object to such pricing, asserting that it would unfairly disadvantage them competitively by allowing the LECs to charge DS1 rates that are below the costs of providing DS1 service.[75]

38. Tier 1 LECs, AT&T, and some small IXCs support setting tandem-switched transport rates that approximate a per-minute cost of dedicated transport,[76] although most LECs and AT&T state that some additional amount should be added to the common transport rate to reflect the use of facilities, such as the tandem and associated circuit equipment, that are used for common transport but not for dedicated transport.[77] Sprint, CompTel, and other third tier IXCs, though, argue in their comments that tandem-switched transport rates should not reflect any cost differences.[78] Subsequently, CompTel has acknowledged that users of tandem-switched

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[73] Ex parte letter from Jay C. Keithley, Vice President, Law and External Affairs, United, to Donna R. Searcy, Secretary, FCC, filed July 29, 1992.

[74] See, e.g., ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from Fred K. Konrad, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed August 7, 1992. See also ex parte letter filed on behalf of the seven BOCs, GTE, Rochester, SNET, and Cincinnati and Suburban from Fred Konrad, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed August 24, 1992. But see ex parte letter from Jay Keithley, Vice President, Law and External Affairs, United Telephone Companies, filed July 17, 1992.

[75] See Ex parte letter from Andrew D. Lipman, Attorney, MFS, to Donna R. Searcy, Secretary, FCC, filed June 26, 1992.

[76] AT&T Comments at 12-13; CBT Comments at 6; CUC Comments at 2; GTE Comments at 10-11; LiTel Comments at 3-4; Metromedia Comments at 7; NECA Comments at 4, NECA Reply at 6; NYNEX Comments at 24; Sprint Comments at 35-36; SWBT Comments at 27; US West Comments at 7, 24; WTC Comments at 15; ex parte letter from Leon M. Kestenbaum, Vice President-General Regulatory, Sprint, to Donna R. Searcy, Secretary, FCC, filed April 3, 1992.

[77] AT&T Comments at 6, 12-13; Pacific Comments at 17-18; Bell Atlantic Comments at 4-5.

[78] CompTel Comments at 15-22; Metromedia Comments at 7; Litel Comments at 4; Sprint Comments at 35-36.

transport use the tandem switch, although CompTel argues that a tandem charge is premature because the costs of the tandem are not yet known.[79]

39. The LECs have generally proposed that under special-access-equivalent rates, an IXC taking tandem-switched transport would pay, in addition to any distance-sensitive charges, a total of two nondistance-sensitive charges -- one for the SWC-to-tandem transmission link and one for the tandem-to-end-office transmission link. Since users of direct-routed transport, however, would purchase only one transmission link between the SWC and end office, they would pay only one nondistance-sensitive charge.[80] CompTel objects to paying a total of two nondistance-sensitive charges for tandem-switched transport, arguing that the amount of nonswitch-related circuit equipment used by direct-trunked and tandem-switched transport is likely to be the same.[81]

3. Discussion

40. In the Notice, we tentatively concluded that we should impose additional pricing requirements beyond the price cap rules for restructured services for setting the initial rate levels for common and dedicated transport. In the LEC Price Cap Order, the Commission recognized that the rates for tariff elements instituted in conjunction with certain fundamental changes in the existing rate structure might require scrutiny beyond that for which the price cap rules provide. We noted in that order that "[p]ricing issues related to . . . services that require fundamental changes in the access charge structure will be resolved in appropriate proceedings as they arise."[82] We now conclude that the changes we are implementing in the transport rate structure do warrant special scrutiny with regard to initial rates.[83]

41. In addition, for future changes in transport rates, we find the price cap restructured services rules are in this instance inadequate to address the risk of anticompetitive behavior by the LECs. Those rules would

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79 Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed May 28, 1992.

80 See, e.g., Ameritech Comments at Exhibit C.

81 See ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, at 10-11, to Donna R. Searcy, Secretary, FCC, filed May 28, 1992.

82 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6835 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon. 6 FCC Rcd 2637 (1991), petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

83 We emphasize, however, that the category of rate restructures justifying special scrutiny is very limited.

limit a LEC's freedom to set transport rates only by requiring that the new rates not produce revenues greater than those permitted by the cap for the traffic-sensitive basket. LECs have an incentive, however, to price direct-trunked transport service as low as possible, and to price the interconnection charge as high as possible. Specifically, the LECs have an incentive to price direct-trunked transport at low levels in order to avoid the use of closet POPs and CAP facilities by IXCs, as described below in the discussion of the GTE waiver.[84] In the future, expanded interconnection for switched transport would give the LECs an even greater incentive to lower direct-trunked rates to undercut CAPs. Accordingly, as discussed below, we will specify the levels at which initial rates should be set, and will require the use of separate service categories for different transport rate elements.

42. We find that the special access rate structure and the associated pricing provide a rational framework for transport. The special access rate structure relevant to the transport portion of the switched access network includes a channel termination from the IXC POP to the SWC, interoffice links between the SWC and end offices, and circuit equipment ordered by the customer. The channel termination parallels the entrance facilities of the switched access network from the IXC POP to the SWC. The special access interoffice link parallels the portion of the LEC switched access network running between a SWC and end office, including any trunking that transits an intermediate office, such as a tandem switching office.

43. The rate structure for a special access interoffice link contains two basic rate elements: a nondistance-sensitive charge, sometimes referred to as a fixed charge, and a distance-sensitive charge. The nondistance-sensitive charge is designed to recover the costs incurred at the ends of the interoffice transmission link, including certain circuit equipment costs.[85] The distance-sensitive, or "mileage," charge is designed to recover the costs

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[84] See Section VIII, below.

[85] The costs recovered today through the nondistance-sensitive charge relate to certain circuit equipment, used at the ends of customer-designated interoffice links, that are employed to derive the channels on the transmission medium. This could include optical line terminating multiplexers (OLTMs), which derive channels on fiber systems, or network channel terminating equipment (NCTE), which derive channels on metallic carrier systems. The nondistance-sensitive charge also would include certain multiplexing equipment or digital cross-connects (DACS) that the LEC uses to load lower bandwidth circuits on higher bandwidth carrier systems. The multiplexer used to load a DS1 circuit on a DS3 circuit at a SWC is included in the DS1 nondistance-sensitive charge. Multiplexers ordered by the customer, by contrast, are charged as a separate rate element. The nondistance-sensitive charge for a DS3 circuit, however, generally would not include any multiplexing costs. We note that the costs of multiplexers in the network may be recovered through either a mileage charge or a nondistance-sensitive charge, depending on the location and function of the equipment.

associated with the transmission facilities between the end points of the interoffice circuit.[86] The special access rate structure does not, of course, include any component reflecting any costs of switching since special access trunks are not switched.

44. Initial LEC transport rates that are based on September 1, 1992 voice grade, DS1, and DS3 special access rates, and that are consistent with a DS3-to-DS1 rate relationship as discussed below, will generally be presumed reasonable. Such rates, therefore, will generally be allowed to go into effect without suspension and investigation if the relationship between the LEC's DS3 and DS1 special access rates falls at or above the benchmark set forth below. Such rates, of course, are still subject to challenge by interested parties.[87] Initial transport rates that are not based on special access rates consistent with a DS3-to-DS1 ratio of at least 9.6 to 1, by contrast, generally will be suspended and investigated unless the LEC demonstrates substantial cause why its transport rates should not be based on its special access rates.

a. DS3-to-DS1 rate relationships

45. Many of the smaller IXCs have criticized the DS3-to-DS1 rate relationships in the LECs' special access rates.[88] In particular, these

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[86] The mileage charge today for interoffice transmission includes the costs of the transmission medium, whether fiber, copper, or microwave, as well as circuit equipment that may be used within the LEC access network to manage the circuits at intermediate locations. Thus, the mileage charge for DS1 and DS3 special access service would include the costs of OLTMs or NCTE used in an intermediate office to rearrange the circuits on carrier systems, or to drop some circuits off at that point. Additionally, a DS1 circuit being carried on a fiber system at a DS3 level would, in many cases, be brought down to a DS1 level at an intermediate office and then returned to the DS3 level to be carried to the end office. In this case, the costs of the multiplexing equipment used in the intermediate office are recovered today through the rates for the mileage charge.

[87] Parties seeking suspension of rates that are presumed reasonable must demonstrate: (1) a high probability that the tariff would be found unlawful after investigation; (2) that suspension would not substantially harm other interested parties; (3) that irreparable injury would result if suspension did not issue; and (4) that suspension would not otherwise be contrary to the public interest. See Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice, 4 FCC Rcd 2873, at paras. 445-458 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (AT&T Price Cap Order), modified on recon. 6 FCC Rcd 665 (1991), remanded on other grounds sub nom. AT&T v. FCC, No. 91-1178 (D.C. Cir. September 8, 1992).

[88] See, e.g., ex parte letter from Michael D. Pelcovits, Director, Regulatory Analysis, MCI, to Linda Oliver, Office of Commissioner Duggan, FCC, filed September 9, 1992. MCI has also argued that the LECs' DS1 to DS3 multiplexing charges are not cost-based, but NYNEX argues that MCI has not

parties argue that it is unfair for small and medium IXCs that use DS1 facilities to pay the averaged, study-area-wide DS1 rate, which reflects the cost of both copper and fiber facilities, while large IXCs can pay fiber-based DS3 rates.[89] These IXCs also question the extent to which the DS3-to-DS1 rate relationships vary among the LECs. In response, the LECs state that existing DS3-to-DS1 rate relationships are reasonable. The LECs also state that variations among the LECs are to be expected because there are varying mixes of copper and fiber facilities used in the different LEC networks, because there are differences in LEC decisions on how to engineer their networks, and because each LEC serves a different market with its own competitive conditions.[90]

46. We conclude that we should not set a particular DS3-to-DS1 rate relationship for all LECs, as urged by some parties. Instead, we find that the existing rate relationships generally provide a reasonable basis for initial transport rates in the interim period. LECs wanting to establish transport rates with a DS3-to-DS1 rate relationship below a selected benchmark will, however, be required to justify the rate relationship.

47. We find, first, that the record does not support the argument that DS1 rates should be based on DS3 special access rates during the interim period, as urged by CompTel and other medium and small IXCs.[91] The

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considered reasonable levels of labor and equipment costs, or of contribution over incremental costs to recover common overheads, in estimating the costs of multiplexing. See ex parte letter from Michael D. Pelcovits to Donna R. Searcy, Secretary, FCC, filed September 1, 1992; ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed September 10, 1992.

[89] See note 70, supra, and text.

[90] See, e.g., ex parte letter from Fred Konrad, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed September 10, 1992; ex parte letter from Janis A. Stahlhut, Director-Federal Relations, US West, to Donna R. Searcy, Secretary, FCC, filed September 10, 1992.

[91] MCI argues that overhead loadings should be applied to DS1 and DS3 circuits on the same per-circuit basis in setting initial rates, and that the LECs should have limited pricing flexibility to diverge from those initial rates. The Commission, however, has on several occasions indicated its preference for setting initial rates with uniform overhead loadings in proportion to direct costs, although our price cap rules give the LECs some flexibility to adjust their prices subsequently. For instance, when overhead costs cannot be directly allocated on the basis of a more specific direct cost allocator, the cost allocation rules underlying the access charge structure allocate overhead costs in proportion to the allocation of a broad range of investment costs. MTS and WATS Market Structure (Phase I), Third Report and Order, 93 FCC 2d 241, 325 (1983), modified on recon., 97 FCC 2d 682 (1983), modified on further recon., 97 FCC 2d 834 (1984), affirmed in principal part sub nom. National Association of Regulatory Utility

interoffice network does not consist entirely of facilities capable of providing DS3 service.[92] The record indicates that the interoffice segment of the access network is a mix of fiber, copper, and microwave facilities.[93] Copper facilities in particular cannot be used to provide DS3 services in the interoffice network. In many instances, a given interoffice route may actually use a combination of facilities using different technologies. Thus, it would not be possible to set DS1 rates on the basis of DS3 rates without ignoring the higher costs associated with copper facilities, or attempting to allocate such costs on a route-by-route basis. Moreover, from a policy perspective, DS3 pricing would increase significantly the amount of the transport revenue requirement recovered through the interconnection charge, as well as slightly increasing the impact of the pricing on the small IXCs.[94]

48. Even if we were to base interim DS1 rates on DS3 prices, the appropriate relationship between DS1 and DS3 rates is not 1/28, as some parties have suggested. There are costs associated with providing DS1 circuits over a DS3 fiber facility that are not incurred when a full DS3 facility is provided to the customer. First, in order to carry an IXC's DS1 level traffic over a DS3 facility in the interoffice network, the DS1 circuit must be multiplexed up to a DS3 at the SWC and back down to a DS1 at the end office.[95] The additional multiplexing costs at the SWC are properly included in the nondistance-sensitive charge of the DS1 interoffice rate. Second, if

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Commissioners v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 53 U.S.L.W. 3583, 3595 (U.S. February 19, 1985). More recently, in considering the allocation of joint costs between regulated and nonregulated services, the Commission adopted an allocation approach that allocated overhead expenses in proportion to the costs that can be attributed to the various services, concluding that such a method closely approximated an economically efficient method if the elasticity of demand for the various outputs is not too dissimilar. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298, 1313 (1987); recon., 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

92 See, e.g., ex parte letter from Janis A. Stahlhut, Director-Federal Relations, Pacific, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from F. Gordon Maxson, Director-Regulatory Affairs, GTE, to Donna R. Searcy, Secretary, FCC, filed March 27, 1992.

93 Id.; US West Comments at 10.

94 Compare the BOC/GTE roll-up results in the ex parte letter from Fred Konrad, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed July 24, 1992 with the BOC/GTE roll-up results shown in ex parte letter from William A. Blase, Jr., Director, Federal Regulatory, Southwestern Bell, to Donna R. Searcy, Secretary, FCC, filed August 12, 1992.

95 See ex parte letter on behalf of the BOCs, GTE, Rochester, SNET, and Cincinnati and Suburban filed by Fred Konrad, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed August 24, 1992.

DS1 direct-trunked traffic is routed through an intermediate office where some of the traffic being carried on the DS3 circuit is dropped off, LECs have to multiplex the circuits down to the DS1 level in order to strip off traffic, and then up again to the DS3 level to continue through the interoffice network.[96] To accomplish this multiplexing, the LEC must convert an optical signal to an electrical signal and then back to an optical signal by using the appropriate optical line terminating circuit equipment. These multiplexing and optical circuit equipment costs are now recovered through the mileage component of DS1 special access interoffice rates. Third, DS1 circuits riding on a DS3 facility will generally not fill the DS3 facility. There will often be fewer than 28 DS1s in use on the DS3. While customers that purchase a DS3 facility pay for the full capacity of the DS3, DS1 rates are set to recover on average the full cost of the DS3 spread among all DS1s, even when it is not fully utilized by DS1 customers.[97] For all of these reasons, we reject the argument that DS1 rates should be based on 1/28 of DS3 rates.

49. We conclude that we should not mandate at this time any fixed ratio between DS1 and DS3 rates for all LECs.[98] Any one ratio for DS1 and DS3 rates is unlikely to be an accurate reflection of cost differences for all LECs, and would probably have to be changed over time. Indeed, the DS3-to-DS1 ratios for many LECs have increased with recent rate changes, with DS1 special access rates decreasing overall since the inception of price caps at a faster rate than DS3 special access rates. In addition, there is no record support for prescribing a specific rate relationship. While the Commission could undertake a cost investigation to determine a DS3-to-DS1 rate relationship before implementing a new transport rate structure and pricing plan, continuing the equal charge rule during the pendency of a lengthy investigation would not serve the public interest. We conclude that a full tariff investigation is not necessary in order to resolve the issues that parties have raised regarding existing special access rates. We therefore will use benchmarked special access rates as a reasonable starting point for new transport rates while we examine the longer term rate issues in the Further Notice.

50. We conclude instead that a LEC's initial DS1 and DS3 transport rates, based on special access rates as of September 1, 1992, should be presumed reasonable if they satisfy a benchmark analysis.[99] DS3-to-DS1 rate

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[96] Id. at 3-4.

[97] Id. at 2-3.

[98] We note that there are no pending complaints filed with the Commission's Enforcement Division challenging the existing special access rate relationships.

[99] See § 69.108 in Appendix D. In the Notice, we suggested that dedicated transport rates might be based on a range of special access rates--i.e., voice grade, DS1, and DS3 -- or might be limited to voice grade and DS1 rates. Allowing the LECs to use a greater range of high capacity

relationships above the benchmark will be presumed reasonable and will generally be allowed to go into effect without suspension and investigation. Rate relationships below the benchmark, however, will generally be suspended and investigated unless the LEC demonstrates substantial cause why its rate relationships should be below the benchmark.[100]

51. In order to establish our benchmark, we have compared the DS3-to-DS1 rate relationships of those LECs offering generally tariffed DS3 service, using September 1, 1992 rates. In comparing those relationships, we have looked at special access interoffice rates plus one channel termination charge, since this approach mirrors the way in which we expect the LECs to use special access rates in setting transport rates.[101] We have also included in the DS3 rate the charge for a DS3-to-DS1 multiplexer, since IXCs buying DS3 service must have their traffic multiplexed down to the DS1 level for switching at the end office, if the end office uses digital switching.[102] The total charge for a DS3 is compared to the total charge for a DS1. Thus, if the total DS3 charge is 11 times the total DS1 charge, the DS3-to-DS1 ratio is 11 to 1.

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services in their direct-trunked transport rates recognizes that, as with special access, there are efficiencies to be gained through high volume usage. We note that today, small IXCs that would otherwise take DS1s can aggregate their traffic together on a DS3, and take advantage of DS3 rates and this may be an alternative for the small IXCs.

[100] We note that the Commission has used a similar approach in the past. In the price caps process, within-band rates are presumed lawful and generally are permitted to go into effect without suspension and investigation. Above-band rates are generally suspended and investigated unless a "substantial cause" showing is made. Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, paras. 230-244 (1990) and Erratum, 5 FCC Rcd 7664, at paras. 466-478 (1990) (LEC Price Cap Order), modified on recon. 6 FCC Rcd 2637 (1991), petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991); AT&T Price Cap Order, 4 FCC Rcd 2873, 3103-3107, at paras. 466-478; RCA American Communications, Inc., v. FCC, Case Nos. 81-1558 and 81-1597 (D.C. Cir., March 8, 1984).

[101] The channel termination charge from special access would be equivalent to entrance facilities, and the interoffice mileage would be equivalent to the direct-trunked transmission piece. MCI, however, has argued that only the ratio between the interoffice mileage charges is relevant. See ex parte letter from Michael D. Pelcovits, Director, Regulatory Analysis, MCI Communications Corporation to Donna R. Searcy, Secretary, FCC, filed September 9, 1992.

[102] If the end office uses analog switching, then both DS1 and DS3 traffic will have to be multiplexed down to the voice grade level. Since both services would require multiplexing, we did not factor that additional multiplexing cost into the rate comparisons.

52. In looking at the ratio of DS3-to-DS1 rates of the twelve LECs offering generally available DS3 service, there appears to be a clustering of ratios between 9.6 to 1 and 15 to 1, and a break at 9.6 with Rochester, Centel,[103] GTE South, and US West having lower ratios. Our concern in establishing a benchmark for transport rates is primarily with those rate relationships at the low end of the spectrum, rather than the high end, because of the potential for unreasonably disadvantaging small and medium IXCs who would purchase DS1 service. Because of concerns raised by the parties about unreasonably low DS3-to-DS1 ratios, we will more closely examine those rate relationships that stand out at the bottom of the range. Accordingly, those transport rates with DS3-to-DS1 relationships of 9.6 to 1 and above will be presumptively lawful during the interim period. Those rates with relationships below 9.6 to 1 will have to be justified by a substantial cause showing. In the absence of a satisfactory justification, such rates will generally be suspended and investigated. Such justifications should explain why the LEC's DS3-to-DS1 transport rate relationship should differ from the rate relationships of other LECs. As an alternative to providing a justification for their rates, LECs with rate relationships below 9.6 to 1 may choose to implement transport rates above that benchmark. In that case, the LEC's initial transport rates will be presumed reasonable, even though they are not based on existing special access rates. As discussed below, however, we find that existing special access rates are a reasonable starting point for determining the level of the interconnection charge for individual LECs, and the ratio of the revenue recovered through the interconnection charge versus facilities-based charges.[104] Thus, rates that depart from existing special access rates so as to be consistent with the benchmark will be presumed reasonable only so long as the ratio of revenue recovered through the interconnection charge versus facilities-based charges is the same as it would be if the LEC's existing special access rates were used.

b. Entrance facilities and direct-trunked transport

53. Based on the record, we find that, subject to the benchmark approach described above, voice grade, DS1, and DS3 special access rates can reasonably be used for entrance facilities and direct-trunked transport pricing for purposes of implementing the interim transport rates, since special access, entrance facilities, and direct-trunked transport use essentially the same underlying facilities.[105] Therefore, LEC transport

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103 Centel's rate relationships for Florida and Illinois fall below the benchmark.

104 See paragraph 62. Facilities-based charges include entrance facilities, direct-trunked transport, tandem-switched transport, and dedicated signalling transport charges.

105 AT&T Comments at 12; NYNEX Comments at 15-18; GTE Comments at 6-8; CBT Comments at 5-6; BellSouth Comments at 11; Pacific Comments at 17; BellSouth Comments at 13-14; Bell Atlantic Comments at 2-5; USTA Comments at 5; US West Comments at 6-7; MFS Comments at 15; Pacific Comments at 4.

rates for entrance facilities and direct-trunked transport that are based on existing voice grade, DS1, and DS3 special access rates will be presumed reasonable as long as the DS3-to-DS1 ratio falls at or above the established benchmark. In applying special access rates, the LECs must apply channel termination rates to the entrance facilities, and interoffice rates to direct-trunked transport in order for their rates to be presumed reasonable.[106] We also find that the current level of special access rates will be a reasonable starting point during the interim period for pricing direct-trunked transport and entrance facilities so long as the DS3-to-DS1 ratio falls at or above the established benchmark. The record demonstrates that the use of existing voice grade, DS1, and DS3 special access rates will generally strike a reasonable balance among the Commission's objectives in this proceeding. In adopting price cap regulation for the LECs, we concluded that July 1, 1990 interstate access rates that were based on the Part 69 allocations to the special access category were the most reasonable basis from which to launch price cap regulation, as a result of the Commission's six-year effort at reforming rate-of-return methods.[107] Price cap regulation was designed to keep them at generally reasonable levels. Therefore, special access-based rates that satisfy the benchmark will generally be presumed reasonable.[108]

54. In order to help ensure that short-term impacts on small IXCs are manageable and to allow IXCs time to adjust to rate changes under the interim rate structure, we will require the LECs to apply only their shortest term rates, whether month-to-month or yearly rates. We also prohibit the LECs from offering transport rates based on volume discounts for multiple DS3s or any other service with higher volume than DS3. This interim approach will mitigate the impact of a rate structure change on small IXCs, allowing a more gradual transition to the new transport rate structure and new competitive conditions. Furthermore, in the Special Access Expanded Interconnection Order, we have questioned whether the largest of the volume and term discounts offered by the LECs may be anticompetitive or discriminatory. We concluded that some of the largest of the discounts warrant additional inquiry, and directed the Chief of the Common Carrier

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106 If a LEC chooses to implement distance-sensitive rates for direct-trunked transport, the interoffice charge, to be presumed reasonable, should include two elements: a nondistance-sensitive element covering the costs of the circuit equipment used at the ends of the interoffice link, and a distance-sensitive element covering the transmission facilities between the ends of the interoffice transmission link.

107 Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, paras. 230-244 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (LEC Price Cap Order), modified on recon. 6 FCC Rcd 2637 (1991), petitions for further recon. pending, appeal docketed, D.C. PSC v. FCC, No. 91-1279 (D.C. Cir. June 14, 1991).

108 Price cap LECs should base their initial transport rates on September 1, 1992 special access rates, adjusted across the board for any changes in the price cap index (PCI) calculated for the July 1, 1993 filing.

Bureau to require certain LECs to file cost support data for the largest existing discounts.[109] For these reasons, we take a cautious approach and here prohibit term and volume discounts for two years. We recognize that limits on term and volume discounts are likely to be appropriate only as interim measures, and that some form of volume and term discounts is reasonable and may be needed in the longer term to ensure that ratepayers receive the benefits of competition. Therefore, in the Further Notice in this proceeding, we seek comment on the desirability of permitting the LECs to offer volume and term discounts under the long-term rate structure. We also seek comment in our Transport Expanded Interconnection Notice on whether we should permit a LEC to offer volume and term discounts when it has expanded interconnection for switched transport in operation.[110]

c. Tandem-switched transport

55. As with direct-trunked transport, the underlying facilities used to provide tandem-switched transport are essentially the same as special access facilities, except for the tandem switch. Tandem-switched transport's use of the tandem switch involves additional cost as compared with direct-trunked transport, and we find that these costs should be reflected in the prices charged. Therefore, setting tandem-switched transport rates at an equivalent of special access rates plus a charge for the use of the tandem is appropriate.[111]

56. The initial rates for the interoffice portion of tandem-switched transport will be presumed reasonable if they are set at a per-minute equivalent of the direct-trunked transport DS1 and DS3 rates, weighted as described below, and calculated using a loading factor of 9000 minutes of use per month per voice-grade circuit.[112] Like special access interoffice

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109 Expanded Interconnection with Local Telephone Facilities & Amendment of the Part 69 Allocation of General Support Facility Costs, CC Docket Nos. 91-141, Report and Order and Notice of Proposed Rulemaking, FCC 92-440, at para. 200 (adopted September 17, 1992) (Special Access Expanded Interconnection Order).

110 Transport Expanded Interconnection Notice at para. 35.

111 The tandem costs will be recovered through the tandem subelement of tandem-switched transport.

112 In the data runs submitted by the BOCs and GTE, the LECs used loading factors ranging from 5727 to 12,500. Ex parte letter from W. W. Jordan, Director-Federal Regulatory, BellSouth, to Donna R. Searcy, Secretary, FCC, filed March 23, 1992. CompTel supports a loading factor of 9000 minutes in this proceeding. Ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed May 6, 1992; see also Sprint Comments at 35-36. The Commission, in other proceedings, has used a loading factor of 9000 minutes. See, e.g., MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Memorandum Opinion and Order, 97 FCC 2d 834, 862 (1984). In this proceeding, too, we

mileage charges, tandem-switched transport would then have two charges related to transmission if the LEC chooses to have distance-sensitive rates: a nondistance-sensitive per-minute charge and a distance-sensitive per-minute charge. The nondistance-sensitive charge would recover the costs of certain circuit equipment at the ends of the interoffice transmission path.[113] The per-minute mile charge would recover the costs associated with the transmission facilities between the endpoints of the interoffice circuit.

57. In basing transport rates for entrance facilities and direct-trunked transport on equivalent special access rates, LECs are able to identify appropriate transport rates based on what the customer orders. A customer ordering direct-trunked transport at DS1 capacity would be charged DS1 rates. For tandem-switched transport, however, the customer designates capacity between the SWC and the tandem,[114] but does not designate capacity on the tandem-to-end-office link, because this transport is "common" to multiple customers. We conclude, therefore, that initial rates should reflect the circuit mix of LEC interoffice facilities used to provide tandem-switched transport, as follows.

58. In setting tandem-switched transport rates under the interim rate structure, rates will be presumed reasonable only if the LECs employ a weighted average of the DS1 and DS3 rates used for direct-trunked transport that reflects the relative DS1 and DS3 circuit mix in the tandem-to-end-office link. In fact, tandem-switched transport often includes a dedicated link from the SWC to the tandem as well as the common links between the tandem and end offices.[115] Our interim rate structure, however, which charges an end-to-end per-minute rate for all tandem-switched transport, makes it difficult to take into consideration both the SWC-to-tandem link and the tandem-to-end-office links in setting rates. As an interim matter, therefore, tandem-switched transport rates weighted to reflect the relative DS1 and DS3 circuit mix in the tandem to end office link will be presumed reasonable.

59. The tandem-switched transport element will also include a per-minute tandem subelement charge that reflects the costs of tandem use. We require that the LECs set this tandem charge initially to recover twenty percent of the current Part 69 tandem revenue requirement as described

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find a loading factor of 9000 minutes to be a reasonable number, one that is in the middle of the range of loading factors provided by the BOCs and GTE.

113 This equipment shall include the multiplexing equipment needed to interconnect DS3 transmission facilities with the end office switch.

114 The interim rate structure does not reflect the customer-designated capacity on the SWC-to-tandem link.

115 See, e.g., NYNEX Reply Comments at 30-31. Tandem-switched transport does not include such a dedicated link when the SWC is collocated with the tandem switch. See Appendix A, Diagram 2.

above.[116] The LECs should calculate the tandem charge based on projected demand after IXC reconfigurations have taken place, just as they calculate the interconnection charge based on reconfigured demand, as discussed below.

d. Non-recurring charges

60. In order to encourage IXCs to reconfigure their networks to make them more efficient and to reduce the expense of network reconfigurations induced by the transport rate structure change, we will require LECs to waive certain nonrecurring charges until approximately six months after the implementation of the interim rate structure. Until May 1, 1994, the LECs shall not assess any nonrecurring charges for service connection when an IXC converts trunks from tandem-switched to direct-trunked or from direct-trunked to tandem-switched or when an IXC orders the disconnection of overprovisioned trunks. We direct the LECs to file tariffs waiving such nonrecurring charges no later than December 1, 1992. In the Notice of Proposed Rulemaking, we seek comment on whether a waiver of nonrecurring charges is also necessary under our long-term rate structure.

e. Interconnection charge

61. We adopt our tentative conclusion that the initial interconnection charge should be calculated as a residual charge, charged on a per-minute basis, and paid by all interstate access customers that interconnect with the LEC switched access network.[117] This means that for price cap carriers, the initial interconnection charge need only comply with the price cap rate restructure requirement that transport charges as a whole are revenue neutral.[118] For rate-of-return carriers, the interconnection charge will be computed by subtracting projected entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport[119] revenues from the Part 69 transport revenue requirement, and dividing by the projected total transport minutes. The level of the interconnection charge will therefore be determined by the decisions made concerning the rate levels for entrance facilities, direct-trunked and tandem-switched transport, and the tandem charge.

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116 See paras. 23-25, supra.

117 In the Transport Expanded Interconnection Notice, we seek comment on which party should pay the interconnection charge, switched transport interconnectors or their customers. We tentatively conclude that, when an IXC buys transport provided by a CAP using expanded interconnection, the IXC should pay the interconnection charge directly to the LEC rather than indirectly through the CAP. Transport Expanded Interconnection Notice at para. 30.

118 As noted below, LECs may use estimates of reconfigured demand levels in calculating the interconnection element.

119 Dedicated signalling transport charges are defined in Section VI below.

62. CAPs, such as MFS and Teleport, are concerned that an interconnection charge containing between fifty and ninety percent of the transport revenue requirement runs counter to the Commission's goal of setting transport rates in accordance with costs, thereby thwarting their ability and the IXCs' ability to use the network efficiently.[120] We agree that such a high interconnection charge is problematic.[121] We find, however, that an interconnection charge calculated as described above in paragraph 61 is a reasonable starting point. While such a high interconnection charge appears reasonable in the short term, though, it is unlikely to be reasonable in the long term. Therefore, as discussed below, we here begin a proceeding to lower the interconnection charge. In addition, we will undertake a review of our Part 69 access charge rules, and as part of that review will focus on lowering the interconnection charge. As the Commission addresses these issues, we expect that the interconnection charge will be reduced, and that, in the end, it will include only costs that are expressly identified as support mechanisms.

63. Several LECs request that the interconnection charge be set to recover revenues lost as a result of demand changes when IXCs reconfigure their networks in response to the new transport rate structure.[122] Ameritech, however, proposes to set the interconnection charge based on existing network usage, arguing that with new traffic growth, it can reuse facilities and recover their costs elsewhere.[123] The LECs are likely to incur some loss of revenue if they cannot factor in reconfigurations in calculating the interconnection charge, since once IXCs incur a flat-rate charge for direct-trunked transport and entrance facilities, they will probably use fewer facilities in order to lower their access costs. On the other hand, the record is not clear on how much IXCs will reconfigure their

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120 MFS Reply at 15-16, 20; MFS Comments at 13-15; ALTS Comments at 18-19.

121 Several parties have suggested that the Commission undertake immediate Part 69 reforms to reduce the level of the interconnection charge. Specifically, they propose that we: (1) reform the allocation of general support facilities (GSF) investments; and (2) reallocate all or a portion of tandem costs to local switching. We will address the GSF issue in the Expanded Interconnection proceeding. Special Access Expanded Interconnection Order at para. 148. As for reallocating tandem costs to local switching, such a change would be unreasonable on the basis of the current record since both tandem-switched and direct-trunked transport users pay local switching charges equally, but only tandem-switched transport users use the tandem switch.

122 Bell Atlantic Comments at Appendix B, page 11; BellSouth Comments at Attachment 1, page 16; NYNEX Comments at 37 and Appendix A, page 10; NYNEX Reply Comments at 6,9; Pacific Comments at Exhibit A, page 3; SWBT Comments at 30; SNET Reply Comments at 8.

123 Ameritech Comments at 21.

networks.[124] Moreover, as IXCs reconfigure their access arrangements, facilities that are no longer needed may be reused, with their costs recovered through these new uses, which could result in a double recovery if the LECs are allowed to include the costs of such facilities in the interconnection charge. We therefore conclude that the LECs will be allowed to set the interconnection charge based on projected demand after IXC reconfigurations have occurred, but that they also will be required to take into account other demand for the same facilities in order to prevent double recovery.[125]

64. In order to check the accuracy of the LECs' demand predictions used to calculate the interconnection charge, we require the LECs to file with the Common Carrier Bureau on August 1, 1994 a report comparing the projected demand used to calculate the interconnection charge with actual demand during the first six months after the implementation of the interim rate structure and pricing plan. Data in these reports should be provided on a month-by-month, as well as an aggregate, basis. We delegate to the Chief, Common Carrier Bureau authority to examine the LEC reports and to require any LEC to adjust its interconnection charge if there is a significant disparity between projected and actual demand.

D. Impact Estimates

65. The seven BOCs and GTE have submitted a number of pricing impact studies estimating the impacts on large, medium, and small IXCs under different transport pricing approaches. The BOCs and GTE submitted several impact studies with their comments in November 1991, and they have subsequently filed additional studies. The LEC models, with the exception of Pacific and GTE, do not rely on statistical samples, but rather incorporate data on all IXCs and all end offices. Some of the pricing studies estimate the impacts assuming that existing network configurations remain the same, and others assume some network reconfiguration by IXCs in response to pricing changes.[126]

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[124] We anticipate that some IXC network reconfiguration will occur before the rate structure adopted herein goes into effect.

[125] The usage-based interconnection charge permits continuation of support flows currently reflected in LEC access rates to minimize market disruption or dislocation. As discussed in the text, the interconnection charge will initially be calculated as a residual to preserve the recovery of non-cost-related revenue currently recovered in the transport category. Use of a per-minute rate for the interconnection charge retains the current usage sensitive transport rate structure and will help ease the transition to a new rate structure.

[126] More specifically, the reconfiguration studies assume that IXCs change the number of transport trunks ordered from LECs and shift traffic between direct-trunked and tandem-switched transport in response to transport rate structure and pricing changes.

66. CompTel, MCI, and Sprint have claimed that the original pricing impact studies filed by the LECs contain flawed methodologies and inconsistent assumptions. Since the LECs filed their original data in November, however, they have refined their models and updated the data. The small and medium IXCs have also challenged the validity of the revised models. Appendix C discusses in detail the assumptions and methodologies used by the LECs in their models, as well as the criticisms raised by certain parties. Even under the best of circumstances, the LECs' rate impact models could not be perfectly uniform, given that each of the LECs has its own unique recordkeeping systems, but we do not find that such absolute uniformity is necessary for us to gain useful insights from the data. We conclude that in most instances, the LEC models, while not precise, provide us with sufficient estimates of the impact of various rate structure changes and pricing approaches.[127] We emphasize that we adopt the interim rate structure and pricing approach for the public policy reasons stated above, not on the basis of the specific results reflected in the data submissions.

67. The BOCs and GTE filed data estimating the impact on IXCs' total switched access costs under the interim rate structure and pricing approach adopted here. The data set forth here are based on existing network configurations.[128] Entrance facilities and direct-trunked transport were priced at voice grade, DS1, and DS3 short-term special access rates. Tandem-switched transport rates were based on a weighted average of DS1 and DS3 rates, with the tandem charge recovering twenty percent of the current tandem revenue requirement. According to the combined BOC and GTE data (not including Pacific),[129] the estimated impact of the rate structure and pricing approaches on IXCs' total switched access costs is as follows:

large IXC: -0.6% medium IXCs: 0.9% small IXCs: 1.8%

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[127] We do not, however, consider the results filed by Pacific, for the reasons discussed in Appendix C.

[128] We note that many IXCs argue that the LECs' reconfigured network results are unreliable. Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992; Sprint Reply Comments at 22-23, CompTel Reply Comments at 10-13; Schneider Reply Comments at 6-9, Cable & Wireless Reply Comments at 5-8. As discussed in Appendix C, we have not considered the reconfigured model results in evaluating the impact of a transport rate restructure on different groups of IXCs.

[129] See results of data run 9.2, ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed July 17, 1992. The data cited above have been recalculated from the July 17 data to exclude Pacific's results, in accordance with the LECs' weighting procedures as set forth in ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed June 5, 1992.

68. Because total switched access costs account on average for only approximately forty percent of an IXC's total costs, assuming the carrier is a facilities-based IXC, the impact on an IXC's total costs would be slightly less than half these percentages. Thus, the data suggest that small IXCs would face an increase in their total operating costs of less than one percent, and medium IXCs of less than one half percent. Moreover, the relatively small spread between the rates paid by the largest and smaller IXCs would also decrease, mitigating concerns about relative as well as absolute impact on small IXCs.

69. Our decision to adopt a new rate structure and pricing approach for transport is based on the policy considerations discussed above. The data filed by the BOCs and GTE provide us with a reasonable picture of the likely access cost increases and decreases that IXCs could experience under our interim rate structure and pricing. Based on our analysis of the data filed, it does not appear that the small IXCs are likely to face unreasonable increases in their access costs during the interim period.

E. Rules Governing Changes in Tandem-Switched Transport, Direct-Trunked Transport, and Entrance Facilities Rates

1. Background

70. In the Notice, the Commission tentatively concluded that transport rate revisions should be governed by modified price cap rules. Under the price cap rules, transport constitutes a single service category in the traffic sensitive basket subject to a price band that allows the LEC to move prices in the service category as a whole up or down five percent each year, after adjusting for changes in the price cap index. The Commission tentatively concluded that greater pricing restraint was needed in order to more fully achieve its goals, and proposed to treat common transport, dedicated transport, and the interconnection charge as three separate service categories under price caps. For the common and dedicated transport service categories, we proposed to apply a five percent banding requirement.

71. For rate-of-return carriers, the Commission recognized that the current Part 69 rules may not be appropriate for subsequent rate changes, and sought comment on the requirements that should apply to changes in rate-of-return carriers' transport charges.

2. Comments

72. Most LECs oppose the creation of three separate service categories for transport, arguing that such an approach would be a step away from price cap regulation, would unfairly restrict their ability to compete in the access market, and would inhibit efficiency and productivity.[130] GTE argues

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130 Ameritech Comments at 39-40, Ameritech Reply Comments at 27; Bell Atlantic Comments at 6; BellSouth Comments at 20; GTE Comments at 20, GTE Reply Comments at 18-23; NYNEX Comments at 36-37; Pacific Comments at 3-4; Rochester Comments at 4-5, 11-12; SNET Reply Comments at 5; SWBT Comments at

that at most, only the interconnection charge should be put into a separate service category.[131] CompTel argues that the price relationship between direct-trunked transport and tandem-switched transport should remain constant.[132] AT&T supports the Commission's proposal, and both AT&T and MFS oppose giving the LECs any greater pricing freedom than was proposed in the Notice.[133]

3. Discussion

73. The requirements set forth in this section will govern all LEC-initiated changes in tandem-switched and direct-trunked transport rates and the entrance facilities charge during the two-year period that the interim rate structure is in effect.

a. Price cap carriers

74. We conclude that we should adopt our proposal for governing rate changes by price cap LECs, with minor modifications. In general, the price cap baskets and bands were intended to give carriers sufficient flexibility to price efficiently, without permitting them to benefit one class of ratepayers at the expense of another. LECs should have sufficient flexibility to permit prices to change if the underlying costs change.

75. We have decided, therefore, to put direct-trunked and tandem-switched transport into separate service categories. This permits us to restrict the LECs' ability to offset reduced direct-trunked transport rates with increased tandem-switched transport rates. Placing tandem-switched and direct-trunked transport in a single service category would be inconsistent with our transport goals. First, it would create the potential for LECs to gain an artificial price advantage over CAP-provided services, whether through closet POPs or in anticipation of expanded interconnection, by offsetting decreases in direct-trunked transport rates with increases in tandem-switched transport rates. In addition, the large IXCs that are heavy users of direct-trunked transport could gain a significant unfair advantage over their smaller competitors that bears no relationship to the underlying costs of providing services. Because the LECs are unlikely to offset the entrance facilities charge with an increase in the direct-trunked transport charge, or vice versa, we will place the entrance facilities charge in the same service category as direct-trunked transport.

76. We conclude also that more restrictive pricing bands than the five percent bands we initially proposed should be applied to the tandem-switched transport service category. Specifically, direct-trunked transport will be

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33; US West Comments at 34.

131 GTE Reply Comments at 21.

132 CompTel Comments at 21-22.

133 AT&T Comments at 14-15; MFS Comments at 22.

subject to a five percent pricing band, but the tandem-switched transport service category will be subject to a two percent band for price increases and the usual five percent band for price decreases. Restricting the LECs from raising tandem-switched transport rates more than two percent will reduce their ability to offset decreases in direct-trunked transport rates with increases in tandem-switched transport rates.[134] In addition, as described below, LECs will not be permitted to raise the interconnection charge to offset decreases in direct-trunked transport rates. At the same time, since direct-trunked transport will be subject to a five percent band, the LECs will still be able to reduce these rates if costs for this service decrease.

b. Rate-of-return carriers

77. For rate-of-return carriers, the current Part 69 rules should not govern rate changes, because they would require rates to be based on cost allocations that do not reflect the pricing approach we have outlined for the interim rate structure and pricing plan. We therefore amend our Part 69 pricing rules for rate-of-return carriers.[135] Specifically, we add Part 69.110 to provide a presumption of reasonableness if entrance facilities rates are set at the same level as special access channel termination rates for equivalent voice grade, DS1, and DS3 services, without term or volume discounts, subject to the benchmark analysis described above. We amend part 69.111 to provide a presumption of reasonableness if the per-minute interoffice tandem-switched transport charge is calculated to equal a per-minute equivalent of direct-trunked transport rates for a weighted average of DS1 and DS3 circuits in the LEC interoffice network between the tandem and end offices. We also amend part 69.111 to provide that the per-minute tandem charge should be calculated so as to recover twenty percent of the current tandem revenue requirement. Part 69.112 is amended to require that the rates for direct-trunked transport be set at the same level as the special access interoffice rates for equivalent voice grade, DS1, and DS3 services, without term or volume discounts, and subject to our benchmark analysis. Finally, Part 69.124 is added to require that the interconnection charge be calculated each year by subtracting the projected entrance facilities, direct-trunked transport, tandem-switched transport, and dedicated signalling transport revenues from the transport revenue requirement, and then dividing by the total projected switched access minutes.

F. Changes in the Interconnection Charge

1. Background

78. In the Notice, the Commission asked whether it should set a schedule for reducing or phasing out the interconnection charge, and also

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134 Increases to the tandem charge adopted in response to the Further Notice, see paras. 130-132, infra, will be treated as an exogenous change for price cap purposes.

135 See Appendix D.

sought comment on the extent to which the LECs should be permitted to increase the interconnection charge. For instance, we proposed to limit the LECs' pricing flexibility by putting the interconnection charge into its own service category, subject to a zero percent pricing band, which would limit streamlined price caps review to increases permitted by changes in the price cap index for the traffic sensitive basket. We also asked for comment on the idea of establishing a dollar ceiling on the revenue to be generated by the interconnection charge.

2. Comments

79. A number of CAPs argue that the Commission should establish a timetable for phasing out the interconnection charge.[136] LECs, however, oppose any predetermined schedule, arguing that this would effectively disallow costs without any showing that they are unreasonable. Many LECs state that the interconnection charge should not be reduced or phased out until separations and access charge reform has reallocated the costs recovered through the charge.[137]

80. CAPs also argue that the level of the interconnection charge should be capped, or that the amount of revenue recovered through the charge should be capped.[138] MFS, for instance, views the interconnection charge as representing only a fixed amount of embedded costs. Without a cap on revenue, MFS argues, interconnection charge revenues would increase whenever switched access usage increases, even though there are no additional embedded costs to recover. MFS notes also that as the CAPs' business increases, the interconnection charge revenue would also increase, even though the LECs would face no additional costs.[139] The LECs object to both a cap on the interconnection charge level and a cap on revenues.[140] LECs also object to the Commission's proposal to limit changes in the interconnection charge to changes in the price cap index, arguing that such limits on their pricing flexibility are unwarranted, and that they need more, not less, flexibility to respond to competition.[141]

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136 MFS Comments at 16; Teleport Comments at 15-16.

137 Bell Atlantic Comments at 5-6; NECA Comments at 4-5, Reply Comments at 9; NTCA Comments at 3; NYNEX Comments at 37; OPASTCO Comments at 6-7; Pacific Reply Comments at 11; Rochester Comments at 15-16; SNET Reply Comments at 7; SWBT Comments at 38; US West Comments at 26.

138 MFS Comments at 16; Teleport Comments at 15-16.

139 MFS Comments at 16.

140 Bell Atlantic Comments at 5-6; NECA Comments at 4-5, Reply Comments at 9; NTCA Comments at 3; NYNEX Comments at 37; OPASTCO Comments at 6-7; Pacific Reply Comments at 11; Rochester Comments at 15-16; SNET Reply Comments at 7; SWBT Comments at 38; US West Comments at 26.

141 Bell Atlantic Comments at 7; Rochester Comments at 15-16.

3. Discussion

81. Because it is initially a residual charge, there will be a number of different types of costs recovered through the interconnection charge. For instance, as a result of the Part 36 and Part 69 cost allocations reflected in the transport rate levels that served as the basis for the first price cap rates, the interconnection charge may include costs more appropriately recovered through other access elements. Under price caps, LECs do not have the flexibility to alter their rates in a way that would reflect reallocation of costs between baskets. Nor do they have the freedom to recover more from one jurisdiction and less from the other. In addition, there are continuing noneconomic cost allocations that result from Part 69 and the separations process for rate-of-return carriers. The interconnection charge will also include LEC costs for facilities currently in place that may not be needed for transport once a new rate structure is implemented, as well as costs associated with copper plant that has been or will be replaced with less expensive fiber facilities. We discuss below in the Further Notice how the interconnection charge might be reduced. In this section, we address changes in the interconnection charge pending our decision on the Further Notice.[142]

a. Price Cap LECs

82. For price cap LECs, we adopt our tentative conclusion that the interconnection charge should be in a separate service category and subject to a zero percent upward pricing band. The price cap LECs should not be permitted to increase the interconnection charge except to reflect changes in the price cap index. Without this constraint, the LECs would be able to reduce their rates for direct-trunked transport, where they may face competition, while increasing the interconnection charge to maintain their revenues. We find that such pricing flexibility would pose an unacceptable risk of anticompetitive behavior.

b. Rate-of-return LECs

83. For rate-of-return LECs, the interconnection charge will be recalculated as a residual charge in each annual access filing. The interconnection charge will be computed each year by subtracting projected entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport revenues from the Part 69 transport revenue requirement, and dividing by the projected total transport minutes.

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142 We do not address here MFS's contention that interconnection charge revenues should be capped so that they do not increase as a result of increases in switched access usage, but seek comment on this issue in the Further Notice. See para. 138 below.

IV. Implementation Schedule

84. Many parties argue that implementation of a new transport rate structure will require the LECs to reach industry consensus through the Ordering and Billing Forum, and to modify their ordering and billing systems. Estimates of the time needed to accomplish these tasks range from nine to eighteen months.[143] Bell Atlantic and USTA argue that implementation issues related to differing state and federal rules will also have to be resolved.[144] In addition, parties note that a rate structure change may induce IXCs to reconfigure their access arrangements, which will also require time to complete.

85. We conclude that it should take no more than approximately nine months from release of this order for the LECs to make any necessary modifications to their billing and ordering systems, and to file tariffs implementing the new rate structure. The tariffs are scheduled to become effective on 90 days' notice. We therefore direct all LECs, except those exempted from implementation of the new rate structure as discussed below, to file tariffs on August 2, 1993, with the expectation that the new rate structure will become effective on or about November 1, 1993. Thus, the IXCs will have more than enough time to adjust to the interim transport rate structure.

V. Small Local Exchange Carrier Issues

A. Comments

86. A number of small LECs, including South Dakota Network, Inc., Minnesota Equal Access Network Services, Inc., Iowa Network Services, Inc., and NECA, have argued that small rural exchange carriers should not be required to offer direct-trunked transport unless it is technically and economically feasible for them to do so.[145] NECA asserts that it is often not feasible for small LECs to offer direct-trunked transport. For instance, NECA states that small rural LECs currently provide transport primarily via the tandems, and that it may be too expensive for them to reconfigure their networks by installing recording and billing capabilities in all end offices in order to provide direct-trunked transport from the SWC to the end office. According to NECA and small LECs, the mandated offering of direct-trunked transport could require small LECs to raise their access charges to cover the

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143 NTCA Comments at 3; Litel Comments at 5-6; Schneider Comments at 12; OPASTCO Comments at 6-7; NECA Comments at 14, 16; United Comments at 5, n. 8; NYNEX Comments at 43-44; US West Comments at 26-32; GTE Comments at 23-35, 27; Bell Atlantic Comments at 8; Ameritech Comments at 31-33; SWBT Comments at 28; USTA Comments at 11-13; BellSouth Comments at 22-23, n. 27; and OPASTCO Reply at 6.

144 Bell Atlantic Comments at 8-9; USTA Comments at 12-15.

145 SD Network Reply at 1; Kin Reply at 3; Minnesota Reply at 1; Tallon Comments at 4-6; CUC Comments at 2; NECA Comments at 10-11.

costs of obtaining additional message recording and trunking equipment at the end offices, and of modifying their billing systems.[146] NECA states, however, that Tier 2 LECs and NECA Traffic Sensitive Pool Member Companies would be capable of billing a flat-rate entrance facility charge if: (1) the entrance facilities charge mirrors the special access channel termination rates; (2) there is adequate implementation time following closure of ordering and billing issues by the Ordering and Billing Forum (OBF); and (3) the provision of direct-trunked transport is made optional for Tier 2 LECs and NECA Pool Members.[147]

87. A number of centralized equal access providers have argued that direct-trunked transport is not compatible with centralized equal access, and have asked that they be exempted from any requirement to provide direct-trunked transport. These parties argue that under existing centralized equal access arrangements, both traffic originating from and terminating at participating exchanges must be routed through the central tandem. Originating traffic must go through the tandem, according to the commenters, because it is only there that the presubscribed IXC can be identified, and the call properly routed. The centralized equal access providers argue that terminating traffic is required to go through the tandem because only the tandem, not the individual end offices, has the measurement and billing capabilities to assess access charges. In addition, these parties assert that the loss of terminating traffic from the centralized equal access arrangement would mean that the fixed costs of the system would have to be spread among fewer access minutes, resulting in higher per minute charges, and the centralized equal access system would no longer be financially feasible.[148]

88. US West agrees that originating calls must go through the central tandem where the end office does not have equal access capability, but argues that IXCs should be allowed to use direct-trunked transport for terminating traffic if the IXC can deliver to the LEC actual usage data for billing purposes. US West also argues that any exemptions should be granted through case-by-case waivers based on specific facts, not through a generic exemption in the rules.

89. AT&T, the only IXC to comment on centralized equal access, argues that for terminating traffic, IXCs should have the option of ordering either direct-trunked or tandem-switched transport. AT&T asserts that this approach would give all LECs an incentive for efficiency. Like US West, AT&T argues

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146 NECA Reply at 4-5.

147 Ex parte letter from Antonio Yanez, Executive Director, Tariff & Regulatory Matters, NECA, to Donna R. Searcy, Secretary, FCC, filed August 19, 1992.

148 NECA Comments at 11; SD Network Reply at 6; Minnesota Reply at 7-12; INS Comments at 14.

that any exemptions from the transport rate structure should be granted only through case by case waivers.[149]

B. Discussion

90. We will require all LECs, except FCC-approved centralized equal access providers and those LECs without measurement and billing capabilities at their end offices, to implement the rate structure set forth in this Order. All LECs, however, are required to provide a flat-rate entrance facilities charge. Centralized equal access providers, therefore, will not be required to offer direct-trunked transport. In cases where a LEC has measurement and billing capabilities only at the tandem, it also will not be required to charge a flat-rate for direct-trunked transport. Exempting centralized equal access providers and those LECs that do not have measurement capabilities at their end offices from implementing our interim rate structure in full will affect only a small percentage of total access lines. There were over 133 million total presubscribed access lines in service as of June 30, 1991.[150] NECA pool members account for 6.8 million of those access lines.[151] Thus, at most, only five percent of the total number of access lines will not have a flat-rate direct trunked transport service. In the Further Notice of Proposed Rulemaking we ask for comment on whether we should require small LECs to charge a flat-rate for direct-trunked transport at end offices without measurement capabilities if an IXC requests direct-trunked transport at that end office.

91. We do not require FCC-approved centralized equal access providers or LECs participating in such arrangements to make any change in their rate structures, except to price entrance facilities on a flat-rate basis as described above. Such carriers may therefore continue to provide non-distance-sensitive, per-minute, tandem-switched transport, but they are required to charge for entrance facilities on a flat-rate basis. Under a centralized equal access arrangement, originating transport must be provided via the tandem because it is only at the tandem that the presubscribed IXC can be identified. With respect to terminating traffic, the Commission has previously approved centralized equal access arrangements with mandatory termination requirements, and we do not revisit that issue in this proceeding. Therefore, we do not require centralized equal access providers or LECs participating in such arrangements to offer direct-trunked transport service.

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149 Ex parte letter from Paul Malandrakis, Regulatory Director, Government Affairs, AT&T, to Donna R. Searcy, Secretary, FCC, filed June 18, 1992.

150 Ex parte letter regarding Universal Service Fund and Lifeline Assistance, Access Tariff Revisions, Transmittal No. 495, at 6, from Antonio Yanez, Executive Director, Tariff and Regulatory Matters, NECA, to Donna Searcy, Secretary, FCC, filed May 15, 1992.

151 Ex parte letter from Richard A. Askoff, Attorney, NECA, to Donna R. Searcy, Secretary, FCC, filed June 30, 1992.

92. All LECs, including centralized equal access providers, however, are required to charge for entrance facilities on a flat-rate basis. The reasons for exempting centralized equal access providers from offering direct-trunked transport do not apply to the provision of entrance facilities since LECs can identify the IXC ordering the entrance facility and the type of entrance facility used, i.e., voice grade, DS1, or DS3. Furthermore, because entrance facilities are dedicated to the use of an IXC and are charged on a flat-rate basis, measurement capabilities are not needed to assess access charges. Requiring all LECs to charge separately for the entrance facilities on a flat-rate basis better reflects the way the costs of transport facilities are incurred, as described above, and promotes more efficient use of the network.

93. We find that these small LECs should be required to charge for entrance facilities on a flat-rate basis.[152] As discussed above, special access channel termination rates will apply to the entrance facilities.[153] The OBF will have one year from release of this Report and Order to reach agreement on implementation issues before the interim rate structure becomes effective on or about November 1, 1993.

94. In some cases the recording functions necessary to provide direct-trunked transport are located at the tandem, not at individual end offices. As a result, additional recording facilities would be required before the LEC could provide direct-trunked transport. Upgrading individual end offices would require the LECs to incur significant costs. According to NECA, there are 2600 central offices within NECA's pool that do not have the necessary recording capabilities to provide direct-trunked transport. NECA states that the costs of upgrading an end office with measurement capabilities range from $40,000 to $65,000. Assuming the lower cost of $40,000 per switch, the cost of upgrading 2600 switches would be over $100 million.[154] Therefore, we will not require LECs to charge a flat-rate for direct-trunked transport where they do not have the necessary measurement and recording functions at the end offices. These LECs must implement the interim rate structure, but need not provide a direct-trunked transport service. To qualify for this exemption, we require that NECA identify in Tariff No. 4 those end offices that do not have measurement and recording capabilities. In cases where a LEC has the necessary recording and billing functions at some end offices but not at others, we will require the LEC to offer a flat-rate direct-trunked transport service at those end offices that have measurement capabilities. We direct those LECs that have, within a study area, both end offices with measurement capabilities and end offices without measurement capabilities to

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152 See ex parte letter from Antonio Yanez, Executive Director, Tariff & Regulatory Matters, NECA, to Donna R. Searcy, Secretary, FCC, filed August 19, 1992.

153 See para. 53, supra.

154 Ex parte letter from Richard A. Askoff, NECA, to Donna R. Searcy, Secretary, FCC, filed June 30, 1992.

charge for tandem-switched transport rate on a per-minute basis with separate charges for transport and for the tandem switch, and one flat-rate direct-trunked transport rate for the entire study area. We also require these LECs to calculate an interconnection charge for the entire study area. There may be instances where it is more efficient for some IXCs to use flat-rate direct-trunked transport in areas where the LEC does not currently have the measurement and recording capabilities to provide it. In the Further Notice, we seek comment on whether LECs should be required to offer a flat-rate direct-trunked transport service if an IXC requests it.

VI. Common Channel Signalling Transport

A. Background

95. In addition to the voice transport services discussed above, the LECs also provide transport for out-of-band signalling information between their common channel signalling (CCS) networks and IXC CCS networks. Common channel signalling is an out-of-band signalling system. Whereas in-band signalling transmits signalling information over the communications channel, out-of-band signalling uses a CCS network separate from, but interfacing with, the communications network. "Common channel" indicates that one channel carries the signalling for many calls simultaneously. Signalling System No. 7 (SS7) is the internationally standardized protocol, or language, currently used to transmit signalling information over the CCS network.

96. The CCS network consists of two basic components: signalling links and signalling points. Signalling links are the digital transmission paths that convey signalling messages within the CCS network. Signalling points (SPs) are nodes in the CCS network that either originate and receive signalling messages, or transfer messages from one signalling link to another, or both. Some Signalling Points are equipped with software that allows them to serve specialized functions. A Signalling Transfer Point (STP) is a packet switch that routes signalling messages between various CCS nodes. STPs have been designed to perform screening and security functions, such as ensuring that unauthorized messages do not enter the CCS network, so interconnections between CCS networks are generally made at the STPs.

97. In the LEC Calling Card Order,[155] the Commission recognized that such transmission of signalling between LEC and IXC CCS networks constitutes transport and determined that revised rules for such CCS transport services should be adopted in the context of this proceeding. Currently, several LECs are offering CCS interconnection services to connect their CCS networks with IXCs' CCS networks pursuant to waivers granted by the Common Carrier

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[155] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Report and Order, CC Docket No. 91-115, 7 FCC Rcd 3528 (1992) (LEC Calling Card Order).

Bureau.[156] The costs of the signalling links connecting the two CCS networks are being recovered as a subelement of transport on a flat, per-line basis. The LECs have also been permitted to create a new transport subelement to recover on a flat, per-port basis the costs of the LEC STP port at which the signalling link terminates.

B. Comments

98. The parties commenting on these issues agree that the rates for CCS transport, like those for transport in general, should be based on special access rates.[157] Ameritech argues that the interconnection charge should not be applied to CCS transport because CCS transport is not part of the rate restructure that led to the creation of the interconnection charge. Southwestern, however, asserts that if CCS transport is treated as switched transport rather than special access, then the interconnection charge should apply.

C. Discussion

99. We conclude that common channel signalling transport between an IXC's CCS network and a LEC STP is a form of switched transport because it is used to deliver, or facilitate delivery of, switched services. This signalling link and the port termination on the LEC STP are dedicated to the use of a single IXC and therefore constitute dedicated transport.[158]

100. In order to better accommodate the specific characteristics of CCS transport in the rate structure, we are creating an additional transport rate element, Dedicated Signalling Transport. Dedicated Signalling Transport will have two subelements. The signalling link will be subject to a flat rate charge set at the same levels as special access rates for equivalent facilities. The charge may be distance-sensitive. The STP port termination will be subject to a flat rate set in accordance with the price cap new services rules, or with proper cost support provided by rate-of-return LECs. We note, however, that LECs that already have tariffs in place for CCS

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156 Southwestern Bell Telephone Company Petition for Waiver of Part 69 of the Commission's Rules, Memorandum Opinion and Order, 6 FCC Rcd 6095 (Com. Car. Bur., 1991), recon. dismissed, DA 92-1158 (Com. Car. Bur., released August 31, 1992), applications for review pending; Local Exchange Carrier Line Information Database, 7 FCC Rcd 525 (Com. Car. Bur.)(1991).

157 Ex parte letter from William A. Blase, Director, Federal Regulatory, Southwestern Bell, to Donna R. Searcy, Secretary, FCC, filed June 8, 1992; ex parte letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed June 12, 1992.

158 We note that other SS7 rate structure issues have been or are being considered in other proceedings. See, e.g., LEC Calling Card Order, 7 FCC 3528 (1992); Provision of Access for 800 Service, CC Docket No. 86-10, 6 FCC Rcd 5421 (1991).

transport are not required to make any changes in their rate levels so long as their rates are in accord with the rate structure set forth here.

101. The interconnection charge will not apply to CCS transport. The interconnection charge was created to recover certain revenues not being recovered through common and dedicated transport revenues under the new transport rate structure. The rate structure and rates for CCS transport, however, have always reflected the way in which costs are incurred, and would not contribute to the size of the interconnection charge. Therefore, it is not appropriate to apply the interconnection charge to CCS transport.

102. For price cap purposes, Dedicated Signalling Transport will be in the same basket and service category as direct-trunked transport. For rate-of-return LECs, we amend the Part 69 rules to provide that the signalling link charges be set each year at the same level as special access rates for equivalent facilities, and the STP port termination charge be set in accordance with our cost support requirements.

VII. Further Notice of Proposed Rulemaking

103. In this Further Notice of Proposed Rulemaking, we seek comment on what long-term transport rate structure and pricing approach would be most reasonable for what will become, given the emergence of competition to local telephone companies and the Commission's expanded interconnection policies, an increasingly competitive environment. In addition, we seek comment on a limited number of other transport-related issues. Resolution of these issues is essential to our ability to implement transport rates that achieve the three goals of this proceeding. In confining this Further Notice to matters that principally affect only transport, we recognize that there are other issues, such as the apparent overallocation of General Support Facilities costs to the transport category, that have implications for other access categories. We conclude that such issues should be considered in other proceedings.[159]

A. Rate Structure and Pricing

1. Overview

104. As discussed in the Report and Order, the Commission has established three important public interest objectives that are implicated in local telephone companies' transport rate structure and pricing decisions: (1) facilitating the development of local access competition; (2) promoting efficient use of local exchange networks; and (3) continuing full and fair interexchange competition. In considering long-term transport rate structure and pricing issues, this Further Notice focuses on what should be the most reasonable approach in an increasingly competitive switched transport

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[159] The General Support Facilities issue, for instance, is addressed in the Expanded Interconnection proceeding. Special Access Expanded Interconnection Order at paras. 147-148.

environment, in which the need for cost-based transport rates will become more critical than it is today.

105. The development of access competition has begun. Some level of competition in the local access market already exists. For example, CAPs now offer fiber-based network services in competition with the telephone companies' access services in many metropolitan areas, even without expanded interconnection. Some of these networks have been used to create closet POPs that compete to some extent with LEC transport service. If the Commission's proposals for expanded interconnection for switched access are implemented, transport will be subject to even greater competition. CAPs may soon be able to compete directly in the provision of not only direct-trunked, but also tandem-switched transport. For example, WilTel, Teleport, and MFS have sought access to LEC functionalities to compete with LEC tandem switching facilities. In particular, they have expressed interest in providing switching facilities that would perform functions similar to LEC tandem switches.[160] We anticipate that such competition will encourage LECs and IXCs to efficiently aggregate interexchange traffic. Any long-term transport rate structure and pricing approach must recognize this development of access competition.

2. Rate Structure

106. The debate in the record to date has focused on two major types of rate structures, the rate structure that we have adopted as an interim measure and the three-part transport rate structure that the Commission proposed in the August 1991 Notice. The interim rate structure consists of: a flat-rate entrance facilities charge; a flat-rate direct-trunked transport charge; a usage-based tandem-switched transport charge, including a tandem switching charge; and a usage-based interconnection charge. The three-part structure would include a flat-rate entrance facilities charge; a flat-rate direct-trunked transport charge; a tandem-switched transport charge comprised of a usage-based common transport element and in some cases a flat-rate dedicated transport element; and a usage-based interconnection charge paid by all parties interconnecting with the LEC switched access network.[161] The interim structure and the three-part rate structure differ principally in the treatment of tandem-switched transport, and it is primarily on the rate structure issues related to that treatment that we seek comment.

107. Under the three-part rate structure, users of tandem-switched transport would pay both a flat rate for the dedicated link from the SWC to

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[160] To allow for such switching, the Transport Expanded Interconnection Notice proposed to require that LECs grant access to certain carrier identification signalling and possibly other functionalities so that interconnectors can engage in competition in the provision of tandem-switched transport service. Transport Expanded Interconnection Notice at paras. 43-46.

[161] See Diagrams 6 and 7 in Appendix A, which illustrate the rate structure.

the tandem and a per-minute rate for minutes carried on the multiple common transport links between the tandem and the various end offices. Mileage for tandem-switched transport would be measured in two segments: airline mileage between the SWC and the tandem for the dedicated link, and airline mileage between the tandem and the subtending end offices for the common links.

108. The interim rate structure, by contrast, employs a single, end-to-end charge for tandem-switched transport, with mileage measured as airline mileage from the SWC to the end office. Under the interim plan, LEC tandem provisioning decisions are irrelevant to the access rates that IXCs pay.

109. Parties have raised concerns regarding the two rate structures, including whether tandem-switched transport links should be unbundled and the manner in which tandem-switched transport mileage should be measured. We seek comment on how these issues should be resolved in the longer term, given an increasingly competitive access environment.

110. Numerous parties, including most LECs and AT&T, have commented on whether tandem-switched transport should be unbundled into two links, or treated as a single, end-to-end link. Several parties in this proceeding have asserted that unbundling tandem-switched transport into two links reflects the way the network is used and the costs are incurred. These parties state that circuits from the SWC to the tandem are dedicated to the use of a single IXC, and should therefore be charged at a flat-rate basis. These interoffice circuits may carry the traffic of multiple IXCs, sharing a conduit or a fiber, but each circuit is dedicated to the use of a particular customer. If that customer does not fully load the circuit, the LEC cannot put the other customers' traffic on it. By contrast, the LECs can commingle the traffic of many different customers on common circuits that are used between the tandem and the end office, according to some parties.[162] The loading, therefore, is controlled by the LEC, not by the customer. On the SWC-to-tandem route, it is the customer that effectively determines the per-minute cost of the circuits through its own traffic management decisions. Parties favoring a three-part rate structure argue that charging flat rates for the dedicated circuit gives customers an incentive to load as much traffic on as few circuits as possible, promoting efficient use of the network.

111. CompTel and small IXCs contend, however, that an end-to-end per-minute rate for tandem-switched transport is appropriate because tandem-

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162 Ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from Marie Breslin, Director, FCC Relations, Bell Atlantic, to Donna R. Searcy, Secretary, FCC, filed March 13, 1992; ex parte from Paul Malandrakis, Regulatory Director, Government Affairs, AT&T, to Donna R. Searcy, Secretary, FCC, filed February 6, 1992; ex parte letter from Anthony M. Alessi, Director-Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from William A. Blase, Jr., Director-Federal Regulatory, Southwestern Bell, to Donna R. Searcy, Secretary, FCC, filed March 6, 1992.

switched and direct-trunked transport comprise an identical service, with customers choosing only between a flat or a per-minute rate.[163] They argue that once an IXC's traffic enters the LEC network at the SWC, it is commingled on facilities with other traffic, including interexchange, intraLATA, and local traffic. These parties reject the assertion that there are interoffice facilities used for transport that are truly dedicated to the use of one particular customer.

112. Medium and small IXCs also argue in favor of an end-to-end rate for tandem-switched transport because they contend that the LEC tandems do not sufficiently concentrate interexchange traffic. WilTel argues that because IXCs using tandem-switched transport have to connect to over 700 tandems to provide ubiquitous nationwide service, tandem-switched transport services do an inadequate job of aggregation.[164] The LECs, however, challenge WilTel's argument. A number of LECs assert that they have not deployed an excessive number of tandems, and that their tandems maximize the efficiency of the network overall.[165] Ameritech argues that the higher transport costs that would result in some areas are caused by low access usage in sparsely populated areas, not by the deployment of multiple tandems.[166] Moreover, tandems are generally useful to IXCs, because they enable smaller IXCs to compete without building their networks to reach as many end offices directly as AT&T has.

113. We seek comment on how this issue should affect our longer term rate structure decisions. We seek comment on the extent to which smaller tandem offices subtend larger tandem offices, and the effect this would have on the degree of traffic aggregation achieved in the access network. We invite comment on whether allegations of poor traffic aggregation because of multiple tandem deployment relate primarily to the small independent telephone companies. Resale competition in the provision of tandem-switched transport, as WilTel proposes, may encourage LECs and IXCs to efficiently

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163 See, e.g., CompTel Comments at 37-40, ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, to Donna R. Searcy, Secretary, FCC, filed April 10, 1992; ex parte letter from Don Detampel, President, Schneider Communications, to Donna R. Searcy, Secretary, FCC, filed May 22, 1992; WilTel Petition at 9-10.

164 See note 19, supra.

165 Ex parte letter from Fred Konrad, Director-Federal Relations, Ameritech, at 8-10, to Donna R. Searcy, Secretary, FCC, filed July 8, 1992; ex parte letter from W. W. Jordan, Director-Federal Regulatory, BellSouth, at 2-5, to Donna R. Searcy, Secretary, FCC, filed July 8, 1992; ex parte letter from Jo Ann Goddard Riley, Director, Federal Regulatory Relations, Pacific, at 4-7, to Donna R. Searcy, Secretary, FCC, filed July 17, 1992; ex parte letter from William A. Blase, Jr., Director-Federal Regulatory, Southwestern Bell, at 1-2, to Donna R. Searcy, Secretary, FCC, filed on July 10, 1992.

166 Ex parte letter from Fred Konrad, Director-Federal Relations, Ameritech, at 5-7, to Donna R. Searcy, Secretary, FCC, filed July 8, 1992.

aggregate interexchange traffic. Requiring only Tier 1 LECs to comply with the long-term rate structure may also alleviate most of the concerns regarding allegations of excessive tandem deployment. Furthermore, some accommodations could be made to avoid unreasonable hardship to IXCs using the tandem, for example, waiving non-recurring charges if the LEC relocates or retires any of its tandems, or rehomes any of its end offices. We ask parties to comment on the viability of these measures, and to provide information on any other methods that might address, in the context of a competitive access environment, the tandem placement and aggregation issues raised by the IXCs.

114. We seek comment on whether a transport rate structure that includes both a flat-rate and a per-minute rate for tandem-switched transport, or an end-to-end per-minute rate for tandem-switched transport, is the better approach in an increasingly competitive access environment. In addressing this question, we ask parties to discuss any non-cost-based reasons why IXCs would choose between tandem-switched transport and direct-trunked transport. We also seek information on how, or if, under the CompTel plan, third parties can interconnect at the tandem and provide any one of the tandem-switched transport links, i.e., SWC to tandem and tandem to end office, to their customers.

115. A second issue raised in the record is the way in which mileage should be measured in calculating distance-sensitive rates for tandem-switched transport. The three-part rate structure would measure mileage for tandem-switched transport in two discrete segments, one from the SWC to the tandem and the other from the tandem to the end office. Measuring mileage in this manner is consistent with the way mileage is measured in special access, i.e., as airline mileage between customer-designated points. In the special access arena, the LECs use airline mileage to measure a special access facility from the SWC to an end office, unless the customer requests special hubbing or multiplexing equipment.[167] In that case, the LEC uses airline mileage to measure the link from the SWC to the point where the special hubbing or multiplexing equipment is located, and then uses airline mileage to measure the link from that point to the end office. Measuring mileage in two segments also gives IXCs an incentive to locate their POPs close to tandems, thereby reducing the length of the dedicated transmission facilities needed from their networks to the tandem.

116. On the other hand, CompTel and small IXCs have opposed measuring mileage for tandem-switched transport in this manner. These parties argue that using the location of the tandem as a measurement point for assessing mileage for common transport is inappropriate because IXCs have no control over the geographic placement of tandem switches and because LEC tandems do not always efficiently aggregate interstate traffic. Specifically, parties argue that if the tandem is a relevant measurement point for calculating the mileage charges paid by tandem-switched transport users, LEC decisions

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[167] For example, a customer with special access lines originating at several locations may choose to route them all to a hub where they are multiplexed together onto higher capacity facilities.

regarding tandem placement and deployment could significantly increase small IXCs' transport rates. Small IXCs also state that the physical routing of direct-trunked transport may often parallel the routing of tandem-switched transport, and thus argue that the mileage for tandem-switched and direct-trunked transport should be measured in a similar manner.

117. We ask for comment on how we should measure mileage for tandem-switched transport, given an increasingly competitive environment and given our goal of continuing full and fair interexchange competition. We also ask whether mileage should be measured differently for direct-trunked and tandem-switched transport. We note that in many cases, the mileage measurement for direct-trunked and tandem-switched transport will be identical under both the three-part and interim rate structures because the SWC is collocated with the tandem. Under the three-part rate structure, IXCs could minimize their transport costs, especially mileage charges, by locating their POPs in a location served by a SWC that is collocated with the access tandem. We seek comment on whether the concerns expressed by small and medium IXCs could be alleviated if, where no SWC is collocated with a given tandem, the LEC were required either to collocate a SWC with that tandem or to designate a SWC near the tandem as a surrogate for a collocated SWC. Traffic from IXC POPs located at such a designated SWC could then be subject to the same charges as if the SWC and the tandem were at the same place. Thus, there would be no dedicated transport charge assessed, and the common transport mileage charge would be based on the airline mileage from the tandem to the end office. Under this proposal, IXCs would be offered an opportunity to locate their POPs in such a way as to reduce their transport costs, without being penalized by LEC network decisions on whether to locate their tandems at SWCs. We invite comment on this approach.

118. Each of the two rate structures discussed has certain advantages and disadvantages in achieving the goals in this proceeding in an increasingly competitive environment. We welcome further comment on these rate structures, and on any proposal that combines the best features of both.

3. Rate Levels

119. We have established pricing rules for the interim period that will determine how initial transport rates should be set at the start of the interim period, as well as rules governing changes in transport rates during the interim period. We seek comment here on whether initial rates for the long-term rate structure should be simply those in place at the end of the interim period, or whether some adjustment is necessary before implementing the new structure. We also seek comment on what rules should govern changes in transport rates under a long-term rate structure.

120. With regard to long-term pricing of transport, we seek comment on the relationship between the DS3 and DS1 rates used for transport as well as on how an increasingly competitive access environment is likely to affect transport rates. As a general matter, in a competitive marketplace, alternative suppliers of direct-trunked and tandem-switched transport may help ensure that the pricing of tandem-switched and direct-trunked transport are cost-based, making it unnecessary to rely on regulatory safeguards alone

to maintain this balance. Accordingly, we ask parties to comment on how competition is likely to affect direct-trunked transport and tandem-switched transport, including the tandem charge, and on the need in a competitive switched transport marketplace for regulatory intervention in setting cost-based rates for transport services. We also ask for comment on the effect on interexchange competition of using existing special access rates for transport. We further ask for comment on whether existing rate relationships encourage efficient IXC use of LEC network facilities.

121. With respect to setting initial prices under the long-term rate structure, we seek comment on whether we should place any strictures on the LECs' DS3-to-DS1 rate relationships. Medium and small IXCs have criticized these relationships. In particular, these parties argue that it is unfair for small and medium IXCs to pay the averaged, study-area-wide DS1 rate, which reflects the cost of copper and fiber, for DS1 facilities that they use, while large IXCs pay fiber-based rates.[168] They argue that when DS1 service is provided over fiber facilities, the DS1 rate should be close to 1/28 of the DS3 rate. They question whether existing DS3-to-DS1 rate relationships are cost-based. These IXCs also question the extent to which the DS3-to-DS1 rate relationships vary among the LECs. In response, the LECs state that their existing DS3-to-DS1 rate relationships are reasonable. The LECs also state that variations among the LECs regarding DS3-to-DS1 rate relationships are to be expected because the mix of copper and fiber facilities used in the access network varies among the LECs, because there are differences in LEC decisions on how to engineer their networks, and because each LEC serves a different market with varying competitive conditions.[169]

122. DS3-to-DS1 rate relationships have been a very contentious issue. Transport rates in place when a long-term rate structure and pricing plan is implemented will have been subject to the benchmark analysis described in the Report and Order. Initial LEC transport rates with DS3-to-DS1 rate relationships above a 9.6 to 1 benchmark will have been presumed reasonable. LEC DS3-to-DS1 rate relationships below the benchmark, however, will generally have been suspended and investigated absent a substantial cause showing.

123. We seek further comment on whether the DS3-to-DS1 rate relationships used in setting interim transport rates are appropriate for long-term rates. Parties should identify those factors that should be considered in evaluating what is a reasonable DS3-to-DS1 relationship. We also ask parties to comment on whether existing DS3-to-DS1 rate relationships are reasonable, why the DS3-to-DS1 rate relationships vary among LECs, and whether the current degree of variation is reasonable. In a more competitive environment, rate relationships and rate disparities may cause less concern than they would if the service were provided by the LECs on a purely monopoly basis. Accordingly, we ask parties to comment on the appropriate rate

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168 See notes 68 and 69, supra.

169 See para. 45, supra.

relationships for transport. Parties supporting a specific rate relationship should discuss whether the rate relationship should be based on the rates for interoffice facilities and channel termination charges or rates for interoffice facilities alone.[170] We also ask whether there is any basis for a difference between the DS3-to-DS1 rate relationship for entrance facilities and interoffice facilities. We note that if, during the course of our examination of the record in this proceeding, we identify a better way to price transport charges than the approach adopted for the interim period, we will consider taking action on the issue of long-term pricing before we adopt a long-term transport rate structure.

124. Several medium and small IXCs have suggested that the use of zone pricing for switched transport services will resolve any disparities in the DS3-to-DS1 rate relationships. In the Expanded Interconnection proceeding, we are permitting the LECs to introduce zone pricing for special access once expanded interconnection for special access is operational, and have proposed the same approach for transport.[171] Interested parties in this proceeding should submit comments on whether zone pricing would help ensure that appropriate DS3-to-DS1 rate relationships are maintained, while enabling LECs to respond adequately to increased competition.

125. We seek comment on whether the LECs should be allowed to implement volume and term discounts for transport rates, both direct-trunked and tandem-switched, in the future. We also seek comment on whether to require LECs to price tandem-switched transport based on the same volume and term discounts that they offer for direct-trunked transport. We also seek information and comment on the appropriateness of rate relationships between DS3 and multiple-DS3 rates.

126. The application of fixed charges for tandem-switched transport under the two rate structures has also been the subject of comment in the record. Under the three-part rate structure, tandem-switched transport might include two fixed, per-minute charges, one for the dedicated link from the SWC to the tandem and one for the common link from the tandem to the end office, while direct-trunked transport would include one fixed charge.[172] CompTel, however, objects to paying two fixed, per-minute charges for tandem-

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[170] The rate relationship established in the Report and Order of 9.6 to 1 is based on interoffice facilities rates for ten miles and one channel termination charge based on one mile. Also included in the calculation is one DS3 multiplexer. No parties have criticized the DS3-to-DS1 rate relationships of channel terminations.

[171] Special Access Expanded Interconnection Order at paras. 172-186; Transport Expanded Interconnection Notice at paras. 32-35.

[172] This fixed charge would recover the equipment costs at the SWC and the end office associated with direct-trunked and tandem-switched transport. The fixed charge is designed to recover the costs incurred at the ends of the interoffice transmission link. For a description of this circuit equipment, see note 85, supra.

switched transport, arguing that the amount of nonswitch-related circuit equipment used by direct-trunked transport and tandem-switched transport is likely to be the same.[173] We seek comment on whether one or two fixed, per-minute charges should apply for tandem-switched transport. Parties that advocate applying the fixed charge only to the dedicated interoffice link of tandem-switched transport should address whether different treatment is warranted when the SWC is collocated with the tandem, so that there is no dedicated interoffice link for which a fixed charge would ordinarily be assessed. Parties should also identify what costs would be recovered by a fixed charge in this situation.

127. To the extent that some segments of the access marketplace become competitive before others, we seek comment on the effect that certain transport rate structure and pricing decisions would have on the less competitive areas. In particular, we note that competition for tandem-switched transport service may develop later than competition for direct-trunked transport or for entrance facilities. In considering long-term rate structure and pricing issues, we ask for information on what effect that should have, if any, on rate structure and pricing decisions.

128. As for changes in transport rates under the long-term rate structure, we tentatively conclude that the rules governing changes in transport rates under the long-term rate structure should be analogous to those for the interim rate structure. Thus, tandem-switched and direct-trunked transport and the interconnection charge would be placed into separate service categories. The entrance facilities charge would be in the same service category as direct-trunked transport. The direct-trunked transport service category would be subject to a five percent pricing band up or down, while the tandem-switched transport category would be subject to a five percent band down and a two percent band up. The interconnection charge would be subject to a zero percent band up, with no restrictions on downward pricing movements.

129. We also tentatively conclude that, for rate-of-return carriers, the current Part 69 rules would not be appropriate for governing rate changes. We propose therefore to amend our Part 69 pricing rules for rate-of-return carriers to reflect any differences between the pricing plan that we adopt for the long-term and the interim pricing plan.

B. Tandem Costs

130. Establishing the correct level of the tandem charge in the context of an increasingly competitive access environment is critical. LEC tandem charges that are too high could create pricing umbrellas that attract customers to new entrants in situations where the LECs may be more efficient. LEC charges that are too low, however, could prevent third parties from

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173 See ex parte letter from Genevieve Morelli, Vice President & General Counsel, CompTel, at 10-11, to Donna R. Searcy, Secretary, FCC, filed May 28, 1992.

entering the marketplace, and thereby undermine the benefits envisioned by full competition, and could harm interexchange competition.

131. As discussed in the Report and Order, the tandem charge is designed to recover, on a minute-of-use basis, the interstate tandem switch costs associated with the provision of tandem-switched transport. In the Report and Order, we find that the tandem element should initially recover twenty percent of the tandem revenue requirement, with the remainder assigned to the interconnection charge. It appears that most, but not all, of the interstate tandem revenue requirement is attributable to tandem-switched transport.[174] SS7 call set-up costs, which are not related to tandem usage and which benefit both direct-trunked and tandem-switched transport users, are currently included in the tandem revenue requirement.[175] Conversely, there appear to be some tandem-switching-related costs that are not currently included in the tandem revenue requirement. Specifically, multiplexing often is needed in order to switch traffic at the tandem. Traffic coming in to a digital switch at a DS3 level has to be multiplexed down to a DS1 level before switching, and then back up to DS3 afterward if it is being carried on a DS3 carrier system. Similarly, because an analog switch requires a voice grade interface for switching, analog tandem switches require that the DS1 be multiplexed down to the voice grade level.[176]

132. We therefore ask parties to comment on what portion of the tandem revenue requirement is tandem-related and should therefore be paid by tandem-switched transport users. Parties should identify and quantify the various uses of the tandem, including intrastate usage. The LECs and CompTel advocate using some type of incremental cost methodology to measure the costs associated with the tandem. Parties are invited to comment on the advantages and disadvantages of an incremental costing approach in general, and its relationship to the prospect of tandem competition. In quantifying the portion of the tandem revenue requirement that relates to the provision of tandem-switched transport, parties should specify the cost approach they used in sufficient detail to permit evaluation of the costing methodology. We also ask commenters to quantify tandem-switched transport-related costs not now included in the tandem revenue requirement, such as tandem-switched related multiplexing costs, that should be recovered through the tandem charge. Any parties using an incremental cost approach should explain their costing approaches in detail, including the appropriate means of calculating incremental costs, and the overhead loadings, if any, that should be incorporated in the study.

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174 See paras. 24-25, supra.

175 As noted above, several LEC estimates indicate that SS7 call set-up costs account for no more than ten percent of the tandem revenue requirement. See note 49, supra.

176 In contrast, the costs of multiplexing equipment located in a transiting office where no switching occurs, as may happen when direct-trunked transport is routed through a tandem office, are included in the special access interoffice rate. See para. 48, supra.

C. Interconnection Charge

133. As we face an increasingly competitive access marketplace, there is a compelling need to determine exactly what costs are in the interconnection charge, and what regulatory treatment should be accorded these costs. The interconnection charge is designed to serve as a transitional measure to avoid dislocations due to the recovery of costs in the transport category that should be allocated to other access categories. The interconnection charge also reduces any unnecessary adverse interim effects on small IXCs resulting from changes in transport rates. As we move into a competitive environment, it is important that only those costs relating to transport service be recovered through transport charges. Accordingly, we tentatively conclude that we should require a phased removal from the interconnection charge of all costs except those relating to clearly identified public policy goals. To the extent that the interconnection charge represents costs more appropriately recovered through access elements other than transport, we propose that those costs be shifted gradually in conjunction with access charge reforms. We also tentatively conclude that at this time we should not cap the revenues recovered through the interconnection charge for price cap LECs. At least some of the costs recovered through the interconnection charge, such as costs that should more properly be recovered through local switching or common line charges, should rise and fall with the price cap indexes for the basket of services with which they should be associated.

134. The comments in this proceeding indicate that the interconnection charge will include a variety of costs. As discussed above, some of these costs are tandem-related and will initially be recovered through the interconnection charge while we conduct further proceedings to determine what portion of the tandem revenue requirement should be recovered from common transport users. Below we discuss several explanations that parties have proffered to describe the types of costs that will be recovered through the interconnection charge.

135. Various parties attempt to show how separations and cost recovery practices result in costs being recovered through existing interstate transport rates that should more properly be recovered through rates for other services. For example, parties state that there is an overallocation of General Support Facilities (GSF) to the transport category because Section 69.307 results in underallocation of GSF investment to the common line category, thereby increasing the GSF investment assigned to other access categories, including transport, as well as the portion of expenses that are allocated based on relative investment.[177] Some parties also contend that

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[177] We propose to amend our rules to apportion a part of GSF investment to common line. Special Access Expanded Interconnection Order at para. 148. Currently, our rules require the LECs to apportion GSF investment among categories based on investment in central office equipment, information origination/termination equipment, and cable and wire facilities excluding Category 1.3, the investment in subscriber lines. See Section 69.307 of the

under the separations process, COE Maintenance expenses are overallocated to the transport category because switching, circuit equipment, and outside plant investment are averaged together, rather than allocated by individual category factors. In addition, commenters argue that the use of circuit terminations to allocate COE Category 4 Circuit Equipment, by eliminating mileage as a factor in the allocation formula, shifted costs to the transport category. To the extent that the interconnection charge recovers costs that we may later find have been improperly included because of the operation of the Commission's Part 69 cost allocation rules and the separations process, we tentatively conclude that the LECs should have an opportunity to recover these costs until we have reexamined separations and access charge rules. An examination of these issues, however, would affect not only transport but other access categories as well. We will therefore consider these issues in other proceedings.[178]

136. As IXCs reconfigure their networks in response to a new rate structure, some facilities currently used in the provision of transport may no longer be needed. The costs of these facilities and the associated overheads from the separations and cost allocation process, though, will initially be recovered through the interconnection charge. Over time, these facilities should be reused for other purposes, at which time their costs should be recovered elsewhere. In the Report and Order, we permit the LECs to set the interconnection charge based on projected demand after IXC reconfigurations occur. However, we require the LECs to take into account reuse of those facilities either to provide other services or to accommodate growth in transport minutes. We now ask parties to comment on how the costs of reused facilities and the associated overheads should be removed from the

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Commission's Rules, 47 C.F.R. § 69.307. A reallocation of GSF investment to subscriber lines will increase the costs allocated to the common line category, and decrease the costs allocated to other access categories, including transport.

[178] Our decision to establish an interconnection charge in this proceeding to preserve, as an initial matter, the recovery of costs currently assigned to transport that may more appropriately belong in other access categories, is not inconsistent with our decision not to establish a contribution charge in the Special Access Expanded Interconnection Order. The record in the Expanded Interconnection proceeding demonstrates that the only significant non-cost-related support flow imposed by the Commission's rules affecting special access is the overallocation of GSF investment to the special access category. See Special Access Expanded Interconnection Order at para. 147. Since the Commission is proposing to amend its rules to correct this overallocation, we are not imposing a contribution charge at this time. The record in this proceeding indicates that dedicated transport and special access use similar underlying facilities, yet more costs are allocated to the Transport category than to the special access category. This suggests that there may be some costs recovered in the transport category that more appropriately belong in other access categories. We have established the interconnection charge to recover these costs while we examine the situation.

interconnection charge. In particular, we seek comment on whether we should reduce the interconnection charge each year by a specified percentage that would reflect our estimate of the facilities reused for other purposes, or whether we should require a detailed accounting of how specific facilities are used with reductions in the interconnection charge to reflect specific changes in usage. We request that in their comments the Tier 1 LECs submit proposals for lowering the interconnection charge to reflect reuse of facilities.

137. Some parties also allege that the interconnection charge will contain costs associated with underdepreciated transport facilities. As LECs deploy more fiber in their network, the useful life of older technologies, such as copper, is reduced in areas where fiber deployment is warranted by service demand. These older facilities, however, may not be fully depreciated, and therefore the underdepreciated portion of this investment will be recovered through the interconnection charge. One method proposed in the record for reducing the interconnection charge is to amortize this shortfall. US West proposed an amortization approach that would result in an increase in the interconnection charge for four years, and then a decrease in that charge at the end of the amortization period. We seek comment on whether we should amortize undepreciated investment recovered through the interconnection charge, and specifically seek comment on US West's proposal, as well as on other proposals for dealing with this investment.

138. As described in the Report and Order, the interconnection charge will be assessed on a per-minute basis. This means that as traffic increases, revenues collected through the interconnection charge would also increase. Some of the costs in the interconnection charge may properly be viewed as increasing as traffic increases. Other costs recovered through the interconnection charge, however, are more appropriately recovered through common line rates; as a general matter, increases in traffic should not result in corresponding increases in common line costs. The price cap indexes (PCIs) were selected to predict likely LEC cost changes for their respective baskets and to allow for rate changes to reflect those cost changes. Nontraffic-sensitive common line services are subject to a different PCI than traffic-sensitive services so that they reflect the different nature of the costs involved. Thus, the PCI for traffic-sensitive services should not be applied to the interconnection charge to the extent that it recovers nontraffic-sensitive costs that should be recovered through common line rates. Therefore, we ask parties to identify which costs recovered through the interconnection charge are traffic-sensitive and which are nontraffic-sensitive, and whether different treatment is required depending upon their classification. We also seek means of indexing or capping the nontraffic-sensitive costs to reflect that these costs by definition should not rise as traffic increases, but rather should decrease on a per unit basis. In addition, we seek comment on MFS' contention that the interconnection charge revenues should be capped because otherwise such revenues will automatically increase as a result of increases in the CAPs' business or other increases in switched access usage.

139. While we have identified a number of cost factors that contribute to the level of the interconnection charge, we believe that because of its residual nature, at least the initial interconnection charge will be used to recover other costs too. We invite parties to identify what additional costs might be recovered through the interconnection element. We also seek comment on the reasons these costs are in the interconnection charge and on the measures that might be used to remove them from this rate element, if that is appropriate. Furthermore, we ask for comment on whether introduction of switched access competition will or should affect our future treatment of the interconnection charge.

140. We request that in their comments, Tier 1 LECs describe the nature, and quantify the amount, of costs they expect will be recovered through the interconnection charge.[179] In particular, the LECs should identify the investment, and the associated accumulated depreciation that has been recovered, that are attributable to excess capacity in the switched transport network, as well as the other investment and all overhead costs assigned to these excess facilities. They should also discuss measures to remove these investment and overhead costs from the interconnection charge as this excess capacity is reused or fully depreciated. Parties should also address whether we should apply different methods for removing these costs depending on whether the facilities are reused for interstate or intrastate services. Tier 1 LECs should also specify which costs should remain in the interconnection charge, and indicate their preferred approach for removing the other costs from the interconnection charge.

141. Finally, we note that MFS has proposed that the Commission require that the interconnection charge be administered by a neutral third party.[180] The administrator, according to MFS, would accept interconnection charge payments from IXCs and CAPs, and forward those payments to the LECs. We seek comment on this proposal.

D. Price Cap Baskets

142. In light of our expectation of increasing competition for transport services, the issue arises whether we need to make adjustments in the LEC price cap baskets. Two parties have urged the Commission to place

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[179] Both NYNEX and SWBT have already filed information delineating the types of costs they expect will be recovered through the interconnection charge, and the amounts associated with each cost factor. Ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX, to Donna R. Searcy, Secretary, FCC, filed March 12, 1992; ex parte letter from William A. Blase, Jr., Director-Federal Regulatory, Southwestern Bell, to Donna R. Searcy, Secretary, FCC, filed June 12, 1992. We expect NYNEX and SWBT to update their submissions to reflect the rate structure and pricing adopted in the Report and Order.

[180] Ex parte letters from Cindy Z. Schonhaut, Director of Legislative and Regulatory Affairs, to Donna R. Searcy, Secretary, FCC, filed September 4 and September 10, 1992.

special access and transport in one price caps basket.[181] Currently, special access services are in their own basket and transport is one service category within the traffic-sensitive basket, along with local switching and information. In creating separate baskets for special access and traffic-sensitive services, the Commission tracked the current Part 69 categories of interstate access services.

143. In the AT&T Price Cap Order, we established three baskets, which were set up so as to separate more competitive and less competitive services.[182] We propose to apply the same principle for special access and transport services, i.e., establish baskets that separate more competitive services from less competitive services. Because we expect that our interconnection policies will facilitate the development of competition for both special access and transport services, we tentatively conclude that we should place special access and transport in one transport basket, for which we propose six service categories. Four of those service categories would be the same service categories that exist now for special access: (1) voice grade/WATS/metallic/telegraph; (2) audio/video; (3) high capacity/Digital Data Service; and (4) wideband data/wideband analog. Another service category would consist of direct-trunked transport and entrance facilities, while the last service category would include tandem-switched transport. Depending on how quickly competition develops in the tandem-switched transport marketplace, we seek comment on whether the tandem subelement should be included in the proposed transport basket, or whether it should remain as a separate category in a less competitive basket that include services such as local switching.

144. We propose to employ for special access categories the same banding requirements that are applied today, and to use the banding requirements for tandem-switched transport, direct-trunked transport, and the interconnection charge as set forth in the Report and Order. Parties are asked to comment on this proposal. We also seek comment on whether the interconnection charge should be in a separate basket by itself, or should remain in the traffic-sensitive switched basket with local switching and information.

E. Small Local Exchange Carrier Issues

145. Under the interim rate structure, all LECs except centralized equal access providers and those LECs without measurement and billing capabilities at their end offices are required to charge a flat-rate for direct-trunked transport.[183] We recognize, however, that there may be instances where it is more cost-effective and efficient for some IXCs to use

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181 Teleport Comments at 15; MFS Comments at iv.

182 Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3051-3053, paras. 359-362 (1989) (AT&T Price Cap Order).

183 See paras. 86-94, supra.

direct-trunked transport, and they should not be prevented from realizing these cost savings or efficiencies unless there are specific reasons why the LEC cannot offer direct-trunked transport. We therefore ask for comment on whether small LECs that have end offices that are not equipped with measurement capabilities should be required to charge a flat-rate for direct-trunked transport if an IXC requests direct-trunked transport at that end office. We also seek information on what types of equipment would be necessary in order to upgrade end office switches to include the necessary recording functions to offer flat-rated direct-trunked transport, and how long it would take to accomplish this task.

VIII. GTE Waiver Request

146. On December 19, 1991, GTE filed a Petition for Waiver to offer a dedicated access transport service (DATS) on an interim basis at specific end office locations in southern California (LATA 5). In its Petition, GTE argues that because of the competitive conditions in southern California, it must offer a flat-rated dedicated transport service immediately in order to avoid significant loss of traffic from the switched network to closet POP arrangements.[184] According to GTE, the equal charge rule is restricting its ability to compete fairly for transport service. We find that GTE has not demonstrated that it faces unique circumstances justifying a waiver of the general rule. Therefore, the GTE Petition for Waiver is denied.

147. DATS would use the existing special access rates for the entrance facility and interoffice components of the service, and the existing switched transport rates for the end office components. DATS users would essentially pay for special access from the POP to the end office (a flat-rate entrance facilities charge and a flat-rate interoffice mileage charge) and would also incur per-minute switched access charges to switch and carry traffic between the end office and a customer's premises. The switched access charges would equal the zero-mileage transport charge for transport from a closet POP to an end office.[185] Thus, the DATS charges would be similar to the charges that an IXC would pay if it set up a closet POP.

148. Thirteen parties filed comments on the GTE Petition.[186] The LECs filing comments generally support the petition, arguing that they face similar competitive circumstances and may request similar relief if GTE's waiver is granted. Some IXCs and CAPs oppose the petition. Many parties

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[184] Under a closet POP arrangement, an IXC would designate a closet POP without a switch very close to the end office, using its own facilities, the facilities of a CAP, or LEC-provided special access to carry traffic from the IXC's main POP. The IXC would then buy transport over the very short distance from the closet POP to the end office, thereby avoiding the mileage charges associated with transport.

[185] The end office in this case is also serving as the SWC.

[186] Allnet, ALTS, California PUC, CompTel, MFS, MCI, MTEL Digital Services, Pacific, SWBT, US Sprint, USTA, US West, and Wiltel.

argue that closet POP competition arises not because of the equal charge rule, but because of excessive distance sensitivity in GTE's rates.[187] Thus, according to these parties, a solution lies within GTE's control, without need for a waiver. Some parties argue that GTE has not proved that it faces unique circumstances justifying a waiver.[188] Wiltel and Allnet argue that the proposed rate structure would discriminate against small IXCs.[189] MCI asserts that GTE has failed to show that it faces extraordinary competition, and that the actual documented losses suffered by GTE are too small to justify granting the petition.[190]

149. In its reply comments, GTE argues that grant of its waiver request would not interfere with the Transport rulemaking because the waiver would be interim in nature, and the DATS service offering would be withdrawn as soon as a new transport rate structure is implemented. GTE states that DATS service is not discriminatory merely because it would provide volume discounts. Finally, GTE argues that it cannot adjust its transport rates, as several commenters suggested, to solve the closet POP problem. GTE asserts that a change in the distance-sensitivity of its rates would not prevent customers from choosing alternatives to GTE's transport service, because the overall level of transport charges would not be reduced.

150. Pursuant to Section 1.3 of our Rules,[191] the Commission may waive any provision of its rules or orders on its own motion or on petition "if good cause therefor is shown." The standard for waiver is high. "An applicant for waiver faces a high hurdle even at the starting gate. When an applicant seeks a waiver of a rule, it must plead with particularity the facts and circumstances which warrant such action."[192] In supporting its case for a waiver, an applicant must demonstrate that there are special circumstances that warrant a deviation from the rule and must show how such deviation will serve the public interest.[193] In WAIT Radio, the court explained that "[t]he very essence of a waiver is the assumed validity of the

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187 Sprint Comments at 4, filed February 18, 1992; Allnet Comments at 4-5, filed February 18 1992; MCI Comments at 3, filed February 18, 1992.

188 Sprint Comments at 1-4, filed February 18, 1992; CompTel Comments at 2-4, filed February 18, 1992.

189 WilTel Comments at 2, filed February 18, 1992; Allnet Comments at 3, filed February 18, 1992.

190 MCI Comments at 5, filed February 18, 1992.

191 47 C.F.R. § 1.3.

192 WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) (WAIT Radio). See also Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990) (Northeast Cellular).

193 Northeast Cellular, 897 F.2d at 1166, citing Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970).

general rule ...."[194] Given the validity of the rule, the test identified in WAIT Radio is for the party seeking the waiver to demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.[195]

151. GTE indicates that it has suffered competitive pressures and loss of revenues in southern California resulting from the requirement that GTE provide transport only on a per-minute basis. We conclude that GTE has not demonstrated that it faces unique circumstances that warrant a waiver of the Part 69 rules. GTE has made no showing that the equal charge rule has a different or greater impact upon GTE in LATA 5 than other LECs face in their own regions. In fact, Pacific states that it has lost switched transport customers to closet POP deployment in LATA 5.[196] US West states that it is experiencing a similar set of circumstances in "virtually every large city that it services."[197] Similarly, Pacific and SWBT assert that they risk revenue losses due to closet POP deployment,[198] and USTA also states that its members are facing substantial competition for their interstate switched access services.[199] Some of the BOCs have indicated that if we grant GTE's waiver, they will be requesting waivers too.[200] We therefore deny GTE's petition for waiver.

152. As we stated above, however, the equal charge rule is not sustainable in a competitive environment.[201] The issues raised by GTE illustrate the importance of moving forward with transport rate restructuring so that the LECs can charge flat rates for direct-trunked transport. GTE's petition argues that a rate structure that requires LECs to provide transport on a per-minute basis inhibits switched access competition because LECs cannot offer flat rate services similar to the flat rate services offered by the CAPs. GTE asserts that although we have not yet authorized switched transport expanded interconnection, major access customers in LATA 5 have bypassed GTE's per-minute switched transport service in order to obtain flat-rated service from CAPs. Other customers, according to GTE, are threatening

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194 WAIT Radio, 418 F.2d at 1158.

195 See Northeast Cellular, 897 F.2d at 1166, citing WAIT Radio v. FCC, 418 F.2d 1153, and Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970).

196 Pacific Comments at 2-4, filed February 18, 1992.

197 US West Comments at 4, filed February 18, 1992.

198 Pacific Bell Comments at 2-3, filed February 18, 1992; SWBT Comments at 1, filed February 18, 1992.

199 USTA Comments at 1, filed February 18, 1992.

200 See, e.g., Pacific Comments at 5, filed February 18, 1992.

201 See paras. 20 and 29, supra.

to do the same. GTE provides examples of the cost reductions that IXCs operating in LATA 5 are able to achieve using a closet POP arrangement rather than GTE's switched transport service.[202]

153. Several parties suggest that GTE's rates are overly distance-sensitive, making it attractive for IXCs to establish closet POP arrangements and avoid GTE's per-minute switched transport charge. They argue that GTE could remedy the situation if it reduced the distance-sensitivity in its transport rates. It is not clear, however, that reducing distance-sensitivity would ease the competitive pressures. Even if GTE reduced the distance-sensitivity of its rates, customers might still prefer closet POP arrangements in some cases so that a portion of an access customer's transport rate can be paid on a flat-rate, rather than a per-minute basis.

154. GTE submits information purporting to show that with an 80 percent reduction in its per-minute mile transport rate, GTE would still not be able to match the price of a closet POP arrangement using DS3 special access service to get from the IXC POP to the closet POP. GTE compares its per-minute mile transport rate with its DS3 rate to show that its largest access customers would pay less for a closet POP arrangement than for switched transport, even with an 80 percent reduction. Thus, it appears that there are cases in which it would be more cost-effective to establish a closet POP than to purchase switched transport service under the equal charge rule. This problem does not appear to be unique to GTE. For example, US West also compares its tariffed per-minute transport rate of 1.5473 cents for traffic carried a distance of 25 miles from a SWC to an end office with the per-minute rate of 1.4318 cents that an IXC would pay using a closet POP arrangement. This figure includes the special access rate for the facility between the main POP and the closet POP, and the switched transport charge for the facility between the closet POP and the LEC end office.[203] Other LECs suggest that they face similar problems.[204] An inability to compete with closet POP arrangements thus appears to result at least in part from the requirement that transport service be priced on a per-minute basis. Thus the problem is inherent in the equal charge rule, and not unique to GTE.

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202 As an example, GTE states that one IXC has saved $374,659 per year by bypassing GTE's switched transport service. GTE Petition at Attachment A, page 2.

203 US West calculates the closet POP figure of 1.4318 cents per minute by taking its tariffed transport rate of 1.1601 cents per minute for traffic carried one mile between the closet POP and the end office and adding .2717 cents per minute for the DS1 special access facility between the main POP and the closet POP. To derive the per-minute rate for the DS1 special access facility, US West multiplies its tariffed DS1 special access rate of $814 by 300,000 minutes of use per month. US West Comments at 4, filed February 18, 1992.

204 See Pacific Comments at 2-4, filed February 18, 1992; US West Comments at 4-5, filed February 18, 1992; SWBT Comments at 1, filed February 18, 1992; USTA Comments at 1-2, filed February 18, 1992.

155. The establishment of closet POPs and potential CAP entry into the switched transport market make it imperative that the Commission move forward with a transport rate structure that allows LECs to offer flat-rated direct-trunked transport service. We conclude, however, that the proper procedural forum to deal with these matters is a rulemaking proceeding, and not the waiver process. The interim rate structure adopted in the Report and Order will allow the LECs to provide a flat-rate direct-trunked transport service at rates that more accurately reflect the costs of providing such service. Upon implementation of the interim rate structure, the LECs, including GTE, will be able to offer flat rates that are similar to the flat rates offered by the CAPs.

IX. Conclusion

156. In deciding interim transport rate structure and rate level issues, we have focused on how best to meet the three goals in this proceeding. We conclude that the interim rate structure and pricing approach described above best balances the Commission's objectives at this time. For the short term, this interim approach offers an improvement over the equal charge rate structure, and will allow us to begin implementation of expanded interconnection policies. We initiate a Further Notice of Proposed Rulemaking to undertake an examination regarding what long-term rate structure and pricing plan would be most reasonable in an increasingly competitive access environment. With limited exceptions, all LECs are required to implement the interim rate structure within twelve months of the release of this Report and Order.

X. Procedural Matters

A. Ex Parte

157. This is a non-restricted notice and comment rulemaking. Ex parte presentations are permitted, except during the Sunshine period, provided they are disclosed as provided in the Commission's rules. See generally, 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

B. Regulatory Flexibility Act

158. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because the proposed rule amendments, if promulgated, would not have a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers providing interstate transport services directly subject to the proposed rule amendment do not qualify as small businesses since they are dominant in their field of operation. The Commission will, however, take appropriate steps to ensure that the special circumstances of the smaller LECs are carefully considered in resolving those issues. The Secretary shall send a copy of this Further Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the

Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

C. Notice and Comment Provision

159. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before December 18, 1992, and reply comments on or before January 21, 1993. To file formally in this proceeding, parties must file an original and five copies of all comments, reply comments, and supporting comments. Parties wanting each Commissioner to receive a personal copy of their comments must file an original plus nine copies. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. For further information regarding this Further Notice of Proposed Rulemaking, contact Melissa Newman, (202) 632-9342, or Suzanne Tetreault, (202) 632-6363, both of the Common Carrier Bureau, Policy and Program Planning Division.

XI. Ordering Clauses

160. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, 220, and 403, Part 69 is AMENDED as set forth in Appendix D.

161. IT IS FURTHER ORDERED that the rules and requirements set forth herein concerning the rate structure and pricing of local transport ARE ADOPTED.

162. IT IS FURTHER ORDERED that all LECs shall file tariffs incorporating the rate structures set forth herein by August 2, 1993, with an effective date of November 1, 1993.

163. IT IS FURTHER ORDERED that NOTICE IS HEREBY GIVEN of the proposed changes in Part 69 of the Commission's rules. COMMENT IS INVITED on these proposals.[205]

164. IT IS FURTHER ORDERED that WilTel's Petition for Rulemaking IS GRANTED to the extent indicated herein.

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[205] These actions are taken pursuant to Sections 1, 4(i) and (j), 201-205, 218, 220, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 218, 220, and 403.

165. IT IS FURTHER ORDERED that GTE's Petition for Waiver of the Part 69 Rules IS DENIED.

166. IT IS FURTHER ORDERED that the Motion for Leave to File Late by One-2-One Communications is GRANTED.

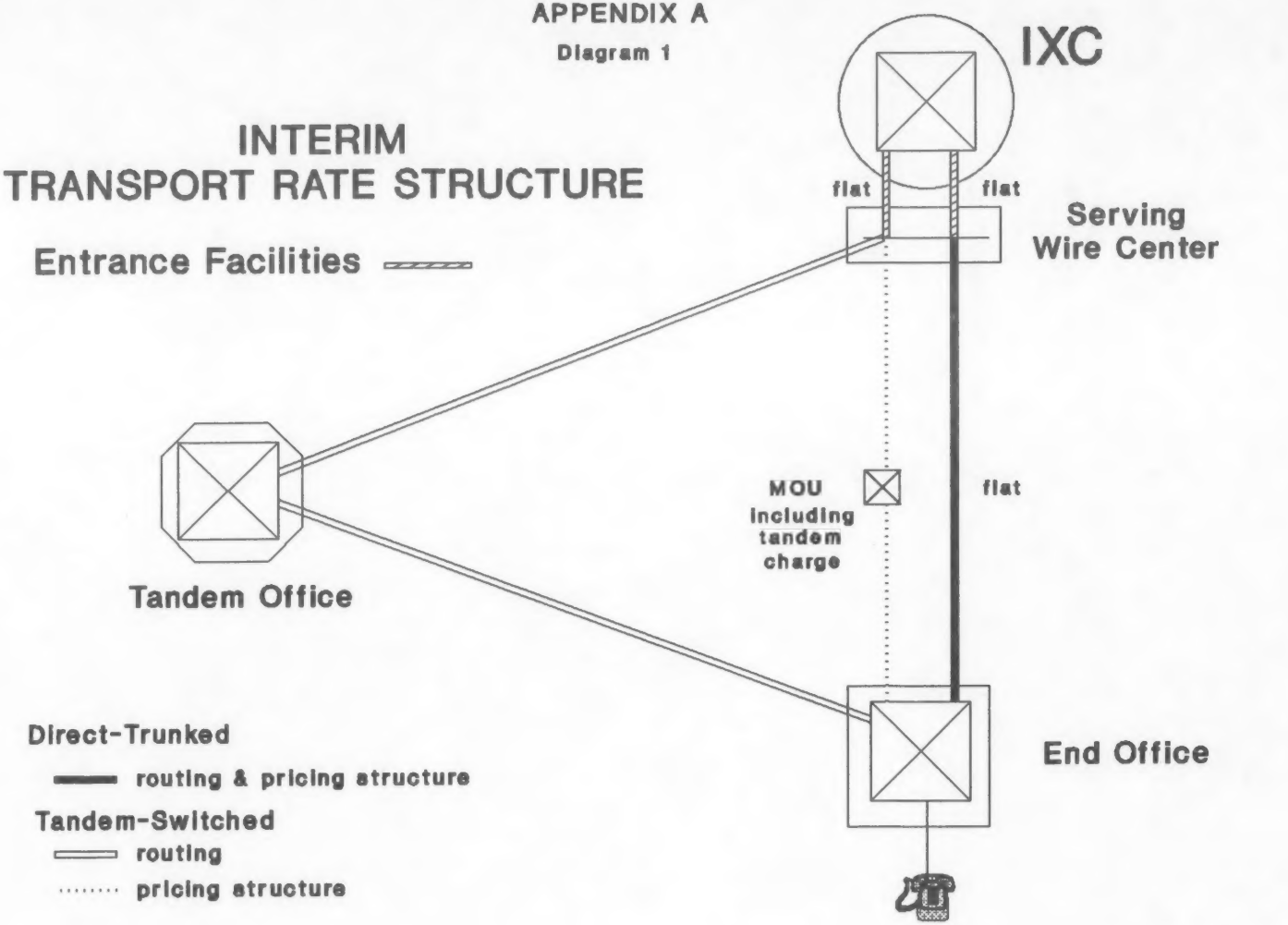
167. IT IS FURTHER ORDERED that the decisions and rules adopted herein SHALL BE EFFECTIVE ninety days after publication of this Report and Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Diagram 1

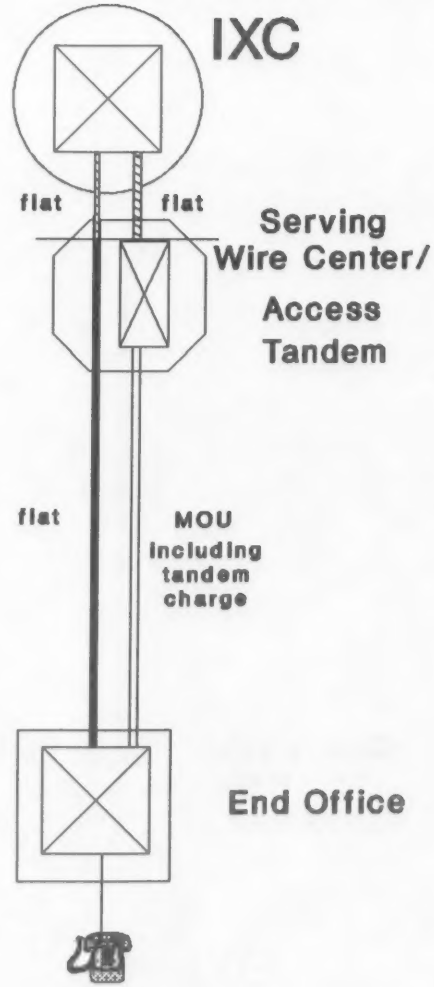


APPENDIX A
Diagram 2

INTERIM TRANSPORT RATE STRUCTURE

SERVING WIRE CENTER LOCATED AT TANDEM OFFICE

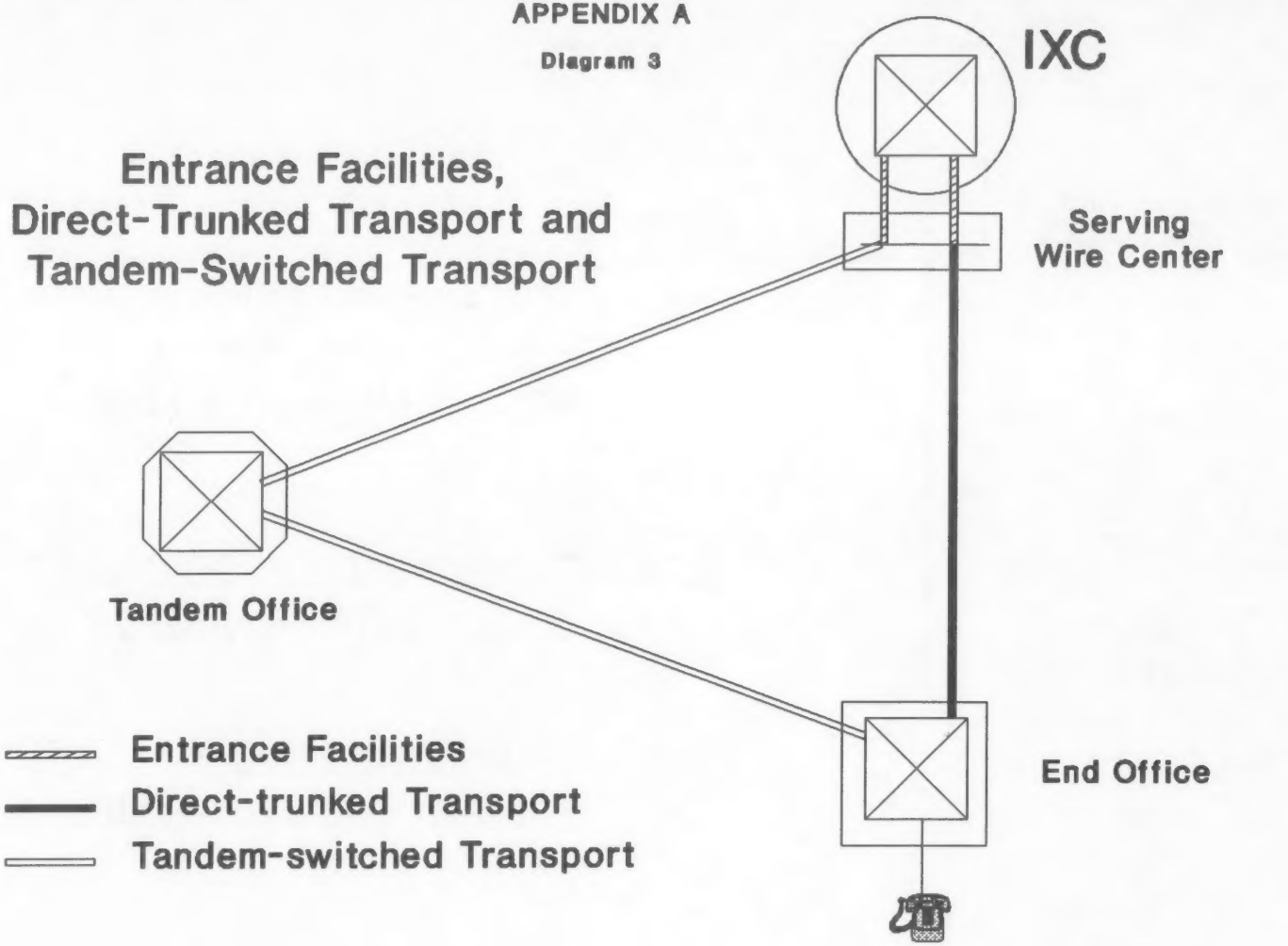
Direct-Trunked Transport
Tandem-Switched Transport
Entrance Facilities



7076

APPENDIX A

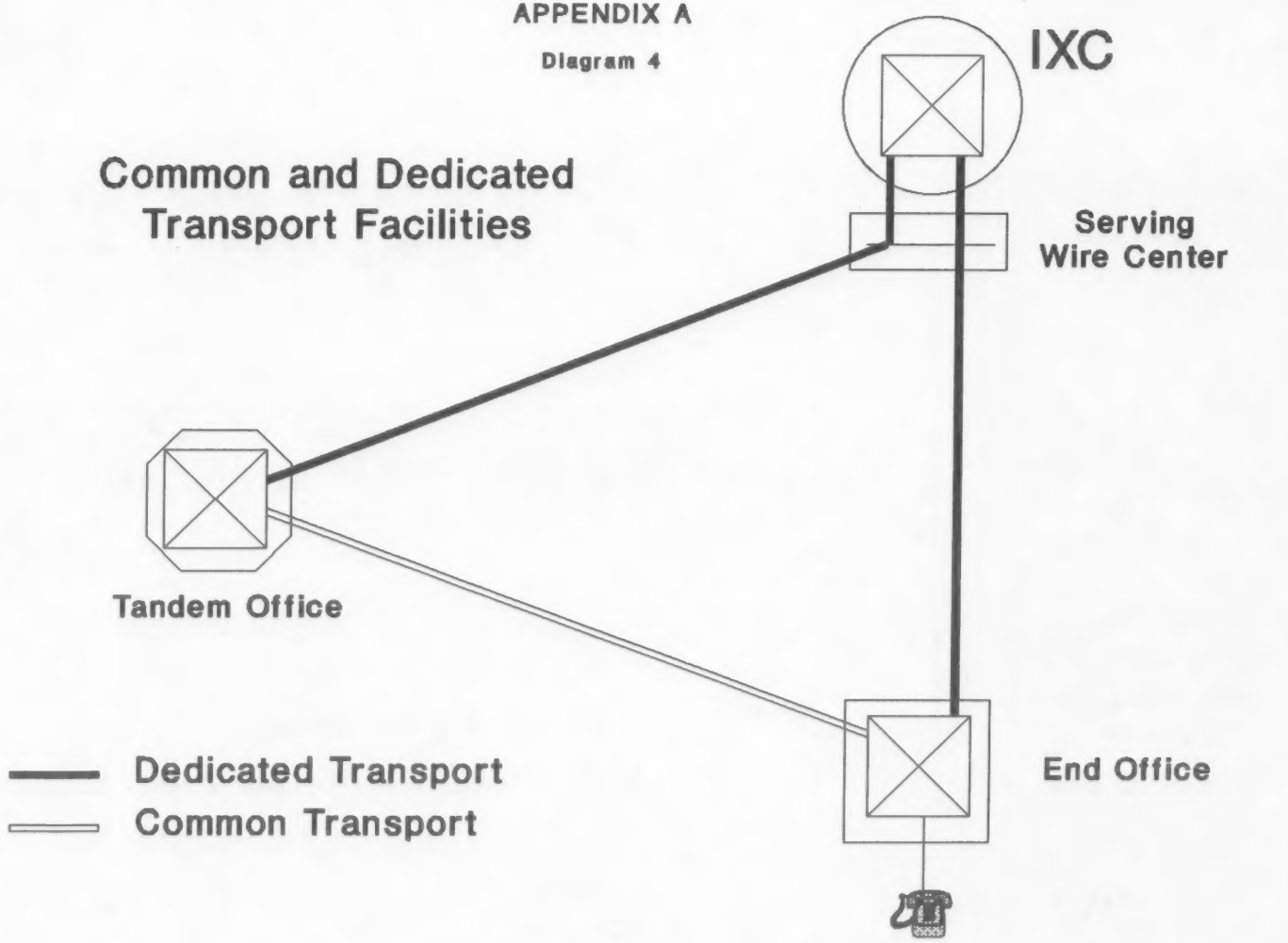
Diagram 3



7077

APPENDIX A

Diagram 4



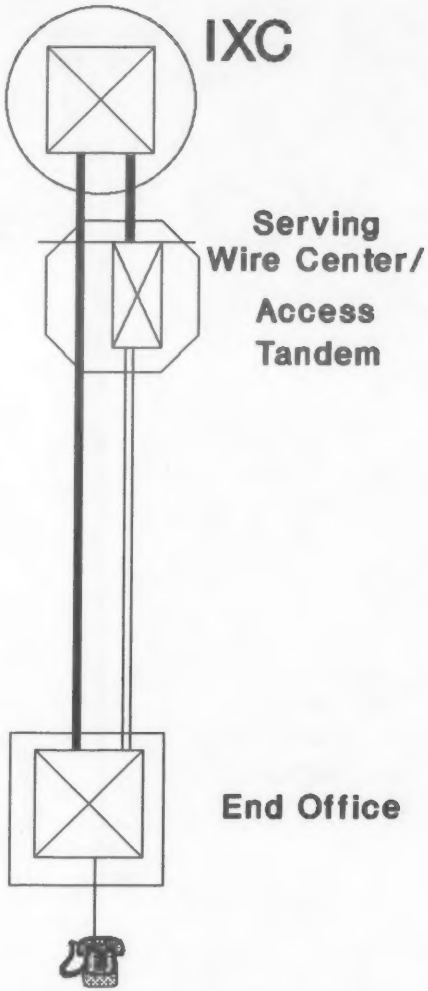
7078

APPENDIX A
Diagram 5

Common and Dedicated Transport Facilities

SERVING WIRE CENTER LOCATED AT TANDEM OFFICE

Dedicated Transport
Common Transport



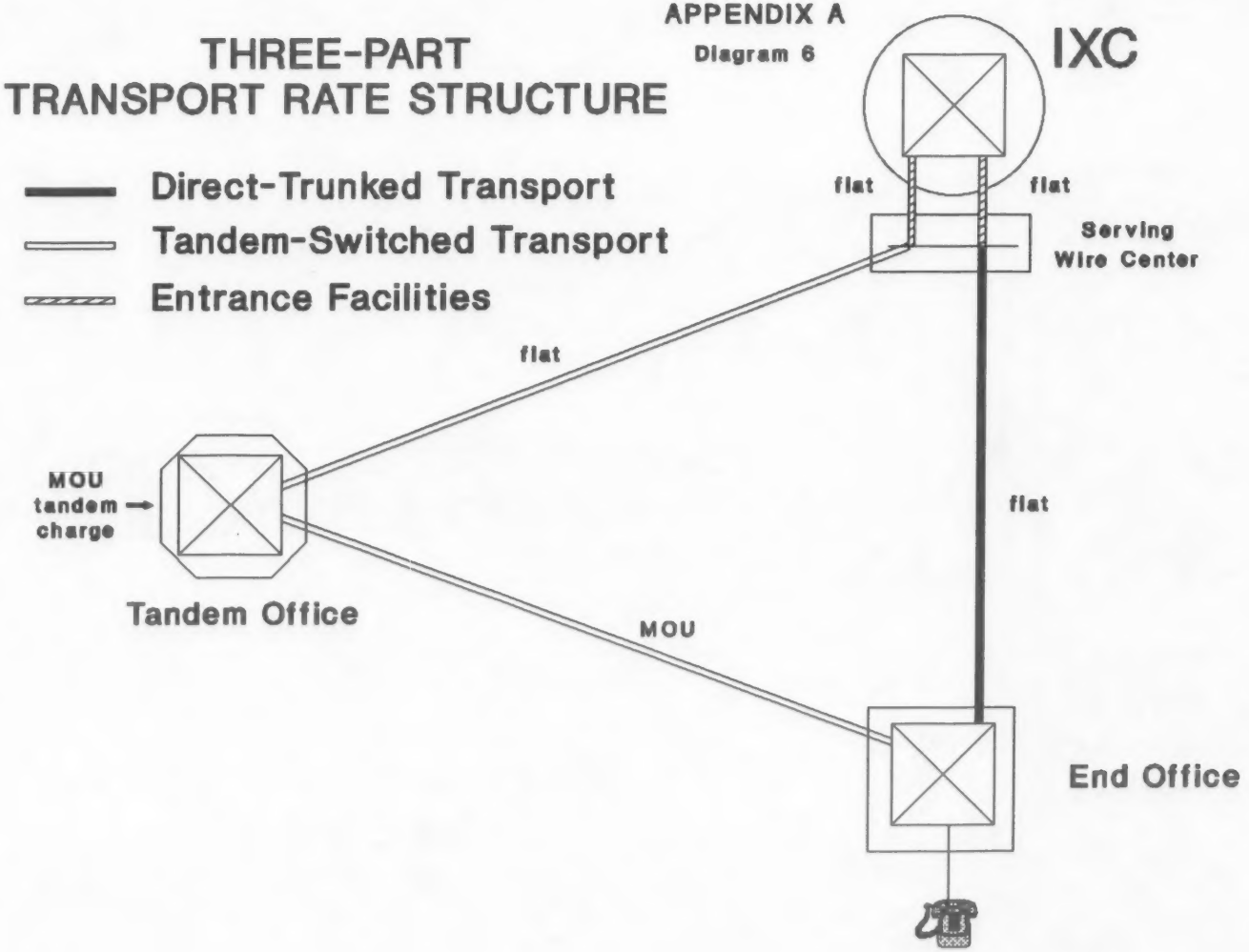
/chart/TRANSDS MON 6-18-92

7079

APPENDIX A

Diagram 6

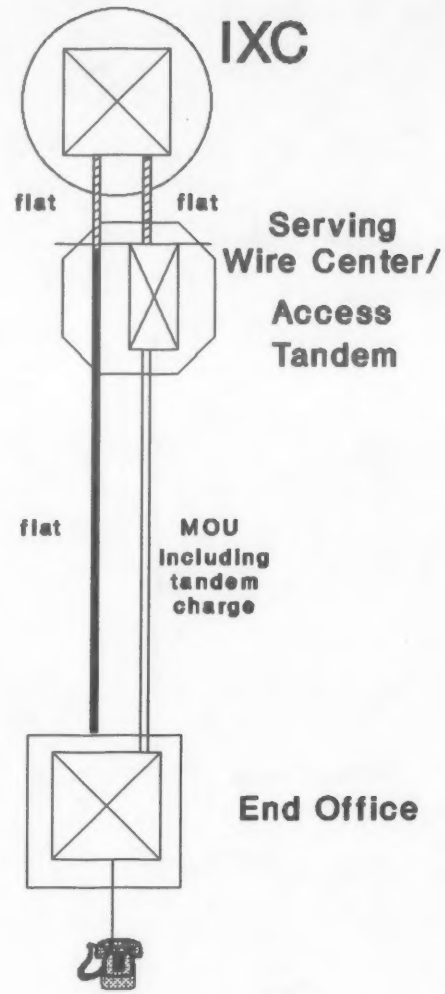
THREE-PART TRANSPORT RATE STRUCTURE



APPENDIX A
Diagram 7

THREE-PART TRANSPORT RATE STRUCTURE

SERVING WIRE CENTER LOCATED AT TANDEM OFFICE



Direct-Trunked Transport
Tandem-Switched Transport
Entrance Facilities

APPENDIX B: COMMENTS AND REPLIES

Transport Rate Structure and Pricing, CC Docket No. 91-213
Order and Further Notice of Proposed Rulemaking
6 FCC Rcd 5341 (1991)

COMMENTS
(filed November 22, 1991)

American Telephone & Telegraph Company (AT&T)
ATX Telecommunications Services
Ad Hoc Telecommunications Users Committee
Advanced Telecommunications Corporation (ATC)
Allnet Communication Services, Inc.
Alltel Service Corporation
Ameritech Operating Companies
Association for Local Telecommunications Services (ALTS)
Atlantic Connections, Ltd.
Bell Atlantic Telephone Companies
BellSouth Telephone Companies
Cable & Wireless Communications, Inc.
California Public Utilities Commission (California)
Cincinnati Bell Telephone (CBT)
Citizens Utilities Company of California (Citizens)
City Signal, Inc.
Competitive Telecommunications Association (CompTel)
DC Public Service Commission (DC PSC)
GTE Service Corporation
General Services Administration (GSA)
Illinois Commerce Commission (ICC)
Illinois Consolidated Telephone Company
International Communications Association (ICA)
Iowa Network Services, Inc. (INS)
Litel Telecommunications Corporation
MCI Telecommunications Corporation
Metromedia Communications Corporation
Metropolitan Fiber Systems, Inc. (MFS)
Michigan Public Service Commission Staff
NYNEX Telephone Companies
National Association of Regulatory Utility Commissioners (NARUC)
National Exchange Carrier Association (NECA)
National Telephone Cooperative Association (NTCA)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell
Rochester Telephone Corporation
Schneider Communications, Inc.
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
SP Telecom
Tallon, Cheeseman and Associates, Inc. (Tallon)

Telecommunications Marketing Association
Telecommunications Opportunities Research
Teledial America, Inc.
Teleport Communications Group
Teleport Denver Ltd.
US West Communications, Inc.
US Sprint Communications
United States Small Business Administration (SBA)
United States Telephone Association (USTA)
United Telephone System Companies (United)
Williams Telecommunications Group, Inc. (WilTel)

REPLY COMMENTS
(filed January 22, 1991)

American Telephone & Telegraph Company (AT&T)
Ad Hoc Telecommunications Users Committee
Advanced Telecommunications Corporation (ATC)
Allnet Communication Services, Inc.
Ameritech Operating Companies
Association for Local Telecommunications Services (ALTS)
Bell Atlantic Telephone Companies
BellSouth Telephone Companies
Cable & Wireless Communications, Inc.
Central Telephone Company
Competitive Telecommunications Association (CompTel)
Consolidated Network, Inc.
DC Public Service Commission (DC PSC)
GTE Service Corporation
General Services Administration (GSA)
Indiana Utility Regulatory Commission
International Communications Association (ICA)
Iowa Network Services, Inc. (INS)
Kin Network Access Division
LCI International
Lufkin-Conroe Telephone Exchange, Inc.
MCI Telecommunications Corporation
Metromedia Communications Corporation
Metropolitan Fiber Systems, Inc. (MFS)
Minnesota Equal Access Network Services, Inc. (Minnesota)
NYNEX Telephone Companies
National Exchange Carrier Association (NECA)
One-2-One Communications (late filed pleading on January 31, 1992)
Pacific Bell and Nevada Bell
Rochester Telephone Corporation
Schneider Communications, Inc.
South Dakota Network, Inc.
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWBT)
Telephone Express

Teleport Communications Group
Teleport Denver Ltd.
US West Communications, Inc.
US Sprint Communications
United Telephone System Companies (United)
Williams Telecommunications Group, Inc. (WilTel)

GTE Petition for Waiver of the Part 69 Rules, DA 92-58
(filed December 19, 1991)

COMMENTS
(filed February 18, 1992)

Allnet Communication Services, Inc.
Association for Local Telecommunications Services (ALTS)
People of the State of California and the Public Utilities Commission of the State of California
Competitive Telecommunications Association (CompTel)
MCI Telecommunications Corporation
MTEL Digital Services, Inc.
Metropolitan Fiber Systems, Inc. (MFS)
Pacific and Nevada Bell
Southwestern Bell Telephone Company (SWBT)
US West Communications, Inc.
US Sprint Communications
Williams Telecommunications Group, Inc. (WilTel)

REPLY COMMENTS
(filed March 10, 1992)

Association for Local Telecommunications Services (ALTS)
GTE Service Corporation
MCI Telecommunications Corporation
Metropolitan Fiber Systems, Inc.
United States Telephone Association (USTA)

APPENDIX C: LEC DATA SUBMISSIONS

I. Background

The seven BOCs and GTE have submitted in this proceeding a number of studies that estimate the impact on large, medium, and small IXCs under different transport rate structure and pricing approaches. These LECs developed computer models that, except for GTE and Pacific, were based on data on the transport usage of all IXCs, at all end offices and all tandems, in the LEC's territory.[206] The models were designed to compare what each group of IXCs (large, medium, and small) pays for access under the transport equal charge rule with what they would pay under alternative rate structure and pricing plans. Estimates of the percentage change in total transport costs, as well as the percentage change in total switched access costs, were calculated.

On November 22, 1991, at the direction of the Commission's staff, the LECs filed impact estimates of five rate structure and pricing scenarios specified by the staff, as well as a number of others that the LECs themselves developed.[207] Subsequently, nine more series of impact estimates were filed. In these later impact studies, the Commission staff worked with the LECs to define the assumptions to be used in the modeling and to ensure uniformity in approach where possible. The series 1, 2, 3, and 5 runs modelled a rate structure similar to the rate structure proposed in the 1991 Notice, with tandem-switched transport subject to both a common transport and a dedicated transport charge. The series 4, 7, 8, and 9 runs modelled a rate structure like the interim structure, with tandem-switched transport subject to a single per-minute transmission charge. In addition, the series 6 runs modeled an alternative rate structure that was a hybrid of the other two structures. The different runs in these series reflected several different pricing approaches, such as variations in the percentage of tandem revenue requirement included in the common or tandem-switched transport charges, in the special access rates used to calculate the dedicated or direct-trunked transport charge, and in the application of fixed charges.

For most runs, the LECs filed results based on existing network configurations, as well as results based on the LECs' estimates of how IXCs would reconfigure their transport usage in response to rate structure and

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206 GTE's model included such detailed data, but only for a subgroup of the states in its territory. Pacific's model, as discussed further below, was not based on data for all IXCs, but on data for five IXCs. Pacific subsequently used a revised model based on data for two tandems.

207 Transport Rate Structure and Pricing, Order and Further Notice of Proposed Rulemaking, CC Docket No. 91-213, 6 FCC Rcd 5341, at n. 68 (1991).

pricing changes.[208] Each of the participating LECs filed its own individual results. For most of the impact studies, the LECs also filed results in which each of the participating LECs' results was weighted in accordance with the LEC's share of total switched access minutes to develop a total weighted average impact.[209]

II. Reliability of the Models

Some IXCs have challenged the validity of these impact studies, alleging that they are based on flawed methodologies and inconsistent assumptions. In this Appendix, we address the reliability of the data filed by the LECs and the specific criticisms raised by the commenters. We conclude that in most instances, except as noted below, the LEC models provide reasonable estimates of the impact of various rate structure and pricing approaches, at least when those estimates are based on existing network configurations. The use of reconfigured network estimates, however, is problematic particularly when applied to the interim rate structure.

We recognize, however, that for various reasons, the LECs' existing network models may tend to overstate or understate to some extent the impact of a rate structure change. For instance, smaller IXCs can reduce their access costs by reselling the services of other IXCs or by utilizing network sharing arrangements with other carriers to terminate interstate calls.[210] Moreover, the LEC models do not take into account the interexchange traffic originating at end offices of LECs other than the BOCs and GTE. Factoring in the more rural areas would tend to reduce the impact on small IXCs because AT&T provides proportionately more of the interexchange service in rural areas and because AT&T makes greater use of tandem-switched transport in

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208 We note that the reconfiguration models generally reflect only reductions in the number of trunks an IXC uses and shifts from tandem-switched to direct-trunked transport. The reconfiguration models do not reflect cost-savings that an IXC could obtain by, for instance, moving its POP in order to reduce distance-sensitive charges, or by sharing facilities with other IXCs.

209 For a more detailed explanation of the weighting procedure used by the LECs, see ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed June 5, 1992.

210 IXCs that terminate their traffic through resale, rather than by purchasing switched access from the LEC, would not face the access charges of a small IXC. They would, instead, resell the services of a medium or large IXC whose access costs were lower, thereby indirectly getting the benefit of the larger carrier's access charges. AT&T has estimated that the impact on small IXCs would decrease by 34 percent if resale and sharing were considered. Ex parte letters from Paul Malandrakis, Regulatory Director, Government Affairs, AT&T, to Donna R. Searcy, Secretary, FCC, filed February 6, 1992 and June 18, 1992.

rural areas than it does in more urban areas.[211] In addition, the existing network models predict initial impacts, and do not fully take into account that IXCs are likely to take measures to reduce their access costs under a new transport rate structure and pricing approach. IXCs that use direct-trunked transport, for instance, may reduce the number of trunks they use in order to minimize their costs. Smaller IXCs may choose to aggregate their traffic together and share transmission facilities.[212] Other changes may also affect impacts in the future. For example, LECs may use their flexibility under price caps to alter their transport rates within the bounds set forth in the Order, which could also affect impacts in the future. In addition, while the LECs are currently restricted to voice grade, DS1, and DS3-based transport pricing, the models do not reflect the effect of volume discounts that we may permit them to implement if we adopt expanded interconnection for switched transport.

While we recognize, then, that the model results are not precise, we conclude for the reasons discussed more fully below that the data submissions in general provide us with a reasonable basis for confirming our conclusion that the interim rate structure and pricing plan are not likely to cause unreasonable increases in IXCs' costs. We emphasize that we adopt the interim rate structure and pricing approach for the public policy reasons stated in the Order,[213] not on the basis of the specific results reflected in the data submissions.

A. Initial and Subsequent Impact Estimates

As noted above, the LECs filed two groups of impact studies, those filed with their initial comments in this docket in November 1991 and several subsequent studies at the request of the Commission staff. The November 1991 studies incorporated approaches that were frequently inconsistent. For instance, the LECs used different traffic loading assumptions in calculating tandem-switched transport rates as a per-minute equivalent of special access rates. They also used different special access rates as the basis for

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211 Ex parte letter from Paul Malandrakis, Regulatory Director, Government Affairs, AT&T, to Donna R. Searcy, Secretary, FCC, filed February 6, April 16, and May 20, 1992.

212 First, IXCs may be able to share a DS3 facility to transport either their originating or terminating traffic, allocating the individual circuits among themselves. Such sharing arrangements would permit even some smaller IXCs to take advantage of the lower unit costs of DS3 transmission. Second, for terminating traffic, several IXCs can combine their minutes of traffic on individual circuits. Several IXCs could combine even their originating traffic on individual circuits if LECs delivered to the IXCs the signaling needed to identify which IXC should carry the call, as requested by the WilTel petition discussed in the Expanded Interconnection Notice on switched transport. See Switched Transport Expanded Interconnection Notice, CC Docket No. 91-141, FCC 92-441, at paras. 43-46 (adopted September 17, 1992).

213 See paragraph 5, supra.

calculating tandem-switched transport charges. They were inconsistent in their use of term and volume discounts in special access rates, and in the application of multiplexing charges.[214] In subsequent submissions, however, a more standardized approach was used.[215]

It is not necessary that all LECs use absolutely identical methods in order for the model results to be useful. A number of different modeling approaches may be reasonable. The examples cited above, however, are instances in which the LECs were able to achieve greater consistency after further review of their modeling methods. Because later data submissions that incorporated more uniform methodologies are available, we do not consider the November 22, 1991 impact studies in this Order. The reasonableness of the later submissions is discussed in the remainder of this Appendix.

B. The LECs' explanations of their methodologies

Ad Hoc, Cable & Wireless, CompTel, ICA, MCI, and Sprint have asserted generally that the LECs failed to provide sufficient explanations of their methodologies to allow for an evaluation of the reasonableness of their methods and assumptions.[216] These concerns were expressed primarily in the Reply Comments filed in November 1991, and we note that the LECs filed additional explanations after the reply comments were filed.[217] For instance, the BOCs and GTE submitted matrixes setting forth a comparison of

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214 Ex parte letter from W.W. Jordan, Director - Federal Regulatory, BellSouth to Donna R. Searcy, Secretary, FCC, filed March 23, 1992.

215 See Section III, below. See also, e.g., ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed June 5, 1992.

216 Ad Hoc Reply Comments at 5-7; Cable & Wireless Reply Comments at 5-8; CompTel Reply Comments at 9-13; ICA Reply Comments at 3; MCI Reply Comments at 31-37; ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992.

217 See, e.g., ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed June 9, 1992; ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed July 1, 1992; ex parte letter from Jo Ann Riley, Director, Federal Regulatory Relations, Pacific Telesis to Donna R. Searcy, Secretary, FCC, filed July 31, 1992; ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed July 30, 1992; ex parte letter from W.W. Jordan, Director - Federal Regulatory to Donna R. Searcy, Secretary, FCC, filed July 28, 1992.

the assumptions and methods used by each company.[218] The LECs have explained how they determined the composition of the existing network, how they estimated the composition of a reconfigured network, and how they developed and applied rates to those networks to determine IXC impacts. We find that these additional submissions reasonably explain the data modeling methods that were used.

In a later ex parte submission, Sprint asserted that it was unclear whether the models assume a single trunk group for all of the IXC's POP-SWC traffic, or separate trunk groups for switched and special, or separate trunk groups to each end office and the tandem.[219] The LECs' models generally parallel the special access rate structure, which charges separately for interoffice channels and channel terminations. The models aggregate transport traffic between the POP and the SWC in sizing the entrance facility trunk, but do not include special access traffic.[220] In addition, CompTel stated that it was unclear whether month-to-month or long term special access rates were used to model the costs of entrance facilities.[221] More recent filings explain that each of the LECs' models rated entrance facilities at the month-to-month channel termination rates for equivalent special access voice grade, DS1, and DS3 facilities, unless a different rate was specified by the Commission staff.[222]

As discussed in greater detail below, the LECs explained how they identified the configuration of the existing and reconfigured networks in terms of special access equivalents, and what rates were applied in calculating each charge. We find that such information is sufficient to permit an analysis of the reasonableness of the LECs' methods.

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218 See, e.g., ex parte letter from W.W. Jordan, Director - Federal Regulatory, BellSouth to Donna R. Searcy, Secretary, FCC, filed March 23, 1992; ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed June 5, 1992.

219 Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992, at 6.

220 See ex parte letter from Kenneth Rust, Director, Federal Regulatory Matters, NYNEX to Donna R. Searcy, Secretary, FCC, filed August 25, 1992

221 Ex parte letter from Genevieve Morelli, Vice President and General Counsel, CompTel to Donna R. Searcy, Secretary, FCC, filed May 5, 1992.

222 See, e.g., ex parte letter from William A. Blase, Jr., Director, Federal Regulatory, Southwestern Bell to Donna R. Searcy, Secretary, FCC, filed August 12, 1992.

C. Consistency of methodology

Some IXCs have argued that the LEC impact studies are invalid because the LECs did not all use identical methodologies.[223] In response to such criticisms, the LECs revised their modeling techniques after their initial data submissions to make them more consistent in many respects. For instance, Sprint criticized the LEC submissions as being based on inconsistent use of term and volume discounts in calculating transport rates based on special access rates.[224] In the data submissions filed after the initial round of comments, however, all of the LECs consistently used either shortest term or longest term rates, as specified in setting the parameters for a particular data run. They also used rates based only on voice grade, DS1, and DS3 special access rates, or such subgroups of those rates as were specified for the run.[225] Other specific assertions of inconsistent modeling approaches are discussed below in other sections of this Appendix.

The later LEC modeling efforts are consistent in many significant respects. For instance, the LECs all used the same assumptions in deriving common transport or tandem-switched transport rates from special access rates, starting from the same rates and using a uniform loading assumption in each data run. The LECs were consistent in the application of multiplexing costs in deriving common and dedicated, and tandem-switched and direct-trunked, transport rates. The use of term and volume discounts was constant throughout the LEC models. The application of fixed charges and the derivation of tandem costs was uniform.[226] We find that the LEC models are not absolutely consistent with one another in their assumptions. Nevertheless, given the purposes for which the modeling results are used, we also find that absolute consistency in the modeling efforts of eight individual companies is not necessary for us to gain useful insights from their results. Nor can it reasonably be expected, given that each of the LECs has its own unique recordkeeping systems. The results of the LEC modeling efforts should not be viewed as absolutely precise quantifications, but only as estimates of the varying impacts of different approaches. Strict consistency, therefore, is not required.

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223 Ad Hoc Reply Comments at 5-7, Sprint Reply Comments at 14-21, MCI Reply Comments at 31-37, Metromedia Reply Comments at 6.

224 Sprint Reply Comments at 18-19.

225 See, e.g., ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed June 9, 1992 and ex parte letter from William A. Blase, Jr., Director, Federal Regulatory, Southwestern Bell to Donna R. Searcy, Secretary, FCC, filed August 12, 1992.

226 See, e.g., ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech, to Donna R. Searcy, Secretary, FCC, filed June 5, 1992 and ex parte letter from William A. Blase, Jr., Director - Federal Regulatory, Southwestern Bell to Donna R. Searcy, Secretary, FCC, filed August 12, 1992.

D. Variation in results

MCI has argued that the variation in impact estimates from one LEC to another demonstrates a statistical weakness in the modeling process.[227] We recognize that there are differences among the LECs' models, as discussed in more detail below. The models are not necessarily invalid, however, simply because of the fact that the LECs show different results. First, there are state-by-state impact estimate differences even when one model is used.[228] In addition, variations in the IXCs' use of direct-trunked and tandem-switched transport in different regions may reasonably affect the results from LEC to LEC, leading to variations in results. Finally, LECs are individual companies serving different areas, with different demand and cost structures, leading to rate variations that can cause different impacts. For instance, if LEC A has a wider disparity between its current special access and transport rates than LEC B, then LEC A will have a larger interconnection charge and impacts in its territory are likely to differ from impacts in LEC B's territory. Some variation in LEC-to-LEC results is, accordingly, to be expected, and does not necessarily demonstrate errors in the modeling.

E. Estimates of existing network configurations

Some IXCs criticize the LECs' modeling of existing network impacts because they are based not on actual information about the current network configurations, but on estimates of those configurations.[229] Some of the LECs do not currently have actual network data about whether an IXC's transport traffic is direct-trunked or tandem-switched, because under the equal charge rate structure routing has been irrelevant to billing, and therefore such information was not always kept. So long as the LECs' methods of estimating current network configurations are reasonable, however, we do not find that the use of estimates per se invalidates the results of the data modeling efforts.

Some IXCs also allege, however, that inconsistencies from LEC to LEC in estimating the current mix of direct-trunked and tandem-switched traffic make the data submissions unreliable.[230] We conclude upon review of the methods

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227 Ex parte letter from Michael D. Pelcovits, Director, Regulatory Analysis, MCI Communications Corporation to Donna R. Searcy, Secretary, FCC, filed September 9, 1992.

228 See, e.g., the impact estimates filed in GTE's Comments.

229 Ex parte letter from Genevieve Morelli, Vice President and General Counsel, CompTel to Donna R. Searcy, Secretary, FCC, filed May 5, 1992; Metromedia Reply Comments at 5-6; ex parte letter from Don Detampel, President, Schneider Communications to Donna R. Searcy, Secretary, FCC, filed May 22, 1992.

230 Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992; CompTel Reply Comments at 9-10.

used that the methods used by each LEC are reasonable even though they are not identical. As noted above, strict uniformity is not required. There may be a number of reasonable approaches, given the LECs' different recordkeeping systems. Therefore, we do not find that the LECs' methods of estimating the current network usage make the impact estimates unreliable. Each LEC's method of estimating the mix of direct-trunked and tandem-switched traffic is discussed below.

Ameritech categorized trunks as tandem-switched or direct-trunked to the end office based upon common language location identifier (CLLI) codes that designate whether each trunk is connected to an end office or an access tandem. In this process, Ameritech used trunking data for all ninety IXCs in its region. After identifying trunks as either direct-trunked or tandem-switched Ameritech designated usage as either direct or tandem-routed based on traffic load information found in the TNDS (Trunk Network Data System), which provides offered versus carried hundred call seconds (CCS) by trunk and by IXC. Ameritech looked at average offered versus carried busy hour CCS for each IXC, for each end office, for the period May through July 1991. Traffic offered and carried on an end office to tandem route was designated tandem-switched, and traffic offered but not carried on an end office to SWC trunk group was designated overflow tandem-switched. Traffic was designated direct-trunked if it was offered and carried on a trunk from the end office to the SWC.[231]

Bell Atlantic used its Carrier Access Billing System (CABS) data for a representative month to determine end office by end office, and IXC by IXC, the number of dedicated trunks between the SWC and the end office and between the SWC and the tandem. CABS data was also used to determine the airline mileage of each of those circuits. Rate cross-over tables were used to convert the number of trunks to equivalent special access facilities (voice grade, DS1, and DS3). Bell Atlantic identified tandem-switched transport minutes as a percentage of total interstate transport minutes for each IXC in accordance with the ratio of dedicated SWC-to-tandem facilities to dedicated SWC-to-end office facilities.[232]

BellSouth determined the mix of direct-trunked and tandem-switched usage in the existing network from a Carrier Access Billing System (CABS) extract that provided the tandem and direct Feature Group D minutes of use at each end office by interexchange carrier.[233]

GTE used its records to determine the number of direct SWC-to-end office trunks, the number of common trunks, and the total number of minutes of use. Using these three numbers, a minutes of use per trunk was determined. The

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231 Ex parte letter from Fred K. Konrad, Director - Federal Relations, Ameritech to Donna R. Searcy, Secretary, FCC, filed July 30, 1992.

232 Bell Atlantic Comments at Appendix A.

233 Ex parte letter from W.W. Jordan, Director - Federal Regulatory, BellSouth to Donna R. Searcy, Secretary, FCC, filed July 28, 1992.

minutes of use per trunk was multiplied by the number of direct trunks to determine how many minutes were direct-trunked, and the remaining minutes were designated common minutes.[234]

NYNEX took network information from the Trunks Integrated Record Keeping System (TIRKS). TIRKS provided information, by IXC, on the number of dedicated POP to end office and POP to tandem circuits, and the number of tandem to end office circuits. The number of dedicated trunks was converted to equivalent special access facilities based on economic crossovers between voice grade and DS1, or DS1 and DS3 facilities. Like Bell Atlantic, NYNEX estimated the number of tandem-switched minutes by multiplying the total number of interstate transport minutes by the ratio of POP-to-tandem dedicated trunks to POP-to-end-office dedicated trunks.[235]

Southwestern Bell took information for January through June 1991 from its CABS system that identified each call as being carried over either a dedicated trunk or a tandem switched trunk.[236]

US West developed a database that identifies direct-trunked and tandem-switched trunks, and direct-trunked and tandem-switched transport minutes primarily by using a tandem indicator populated by its switches. The resulting split between direct-trunked and tandem-switched minutes was verified with information from both the Integrated Access Billing System (IABS) and the TNDS.[237]

While there are differences in the methods used by each of the LECs, each of the methods described above appears reasonably designed to give an accurate estimate of current network usage. Thus, the use of estimates by the LECs listed above was reasonable.

We find, however, that Pacific's modeling process has not been demonstrated to be reliable, and we do not consider the impact studies filed by Pacific. The other LEC models incorporate data on all IXCs' transport usage at all end offices in the LEC's territory. Pacific's initial model, by contrast, was designed to produce results for only five carriers -- AT&T, MCI, Sprint, and two small IXCs, one with 46 million minutes of use per month, and one with less than 2000. Pacific's model lacked data on most IXCs. Because Pacific's model only analyzes the effects of a rate structure and pricing change on two IXCs, there is no indication of the overall or average impact on IXCs in Pacific's territory. There was no showing that the two small IXCs chosen for modeling are representative of small IXCs in Pacific's territory. Therefore, the initial Pacific model cannot be used with the other LEC models in determining the overall effect of a new

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234 GTE Comments at Appendix A, page 7.

235 NYNEX Comments at Appendix B.

236 Southwestern Bell Comments at Appendix B.

237 US West Comments at Appendix A.

transport rate structure on IXCs. On September 2, Pacific filed revised impact estimates based on a new model using all transport traffic at two of Pacific Bell's nineteen access tandems.[238] Pacific asserts that the results from the revised model demonstrate that its earlier results were reasonable. Given the late date on which this newly revised model was filed, as well as the partial nature of its underlying data, we are unable to conclude at this time that any of the Pacific impact estimates are sufficiently reliable in determining the overall effect of a new transport rate structure. There has been an inadequate opportunity for a full evaluation by the Commission staff and other parties. Moreover, it is not clear that the results for two tandems are necessarily representative of the impact that would result if all of Pacific's tandems were included. We do not find that absolute precision in the modeling is necessary, but the Pacific model falls short of the other LEC models to such an extent that we cannot be assured of its reliability. Accordingly, we do not consider the Pacific data.

F. Reconfigured network calculations

Some of the LEC impact studies present impacts reflecting the LECs' assumptions about how IXCs would likely reconfigure their use of transport in response to rate structure and pricing changes. The LECs used two basic approaches to estimating the IXCs' network reconfigurations. BellSouth, GTE, NYNEX, and Southwestern used a "least cost routing" approach.[239] The least cost routing method prices out the cost of routing traffic directly to the end office and the cost of tandem-switched transport, selecting the route that provides transport at the lowest cost to the IXC. Ameritech and US West used a "network engineering" approach. The network engineering models do not consider the prices charged to the IXCs, but instead rely on standard engineering practices to determine how many of an IXC's minutes of traffic would be carried over direct-trunked transport and how many over tandem-switched transport. Bell Atlantic's approach assumed that neither large nor small IXCs would have opportunities to benefit from reconfiguration. Bell Atlantic used engineering estimates to derive the reconfigurations that medium IXCs would adopt, as described below.[240]

Least-cost routing models in general are likely to err somewhat on the side of predicting more reconfiguration from tandem-switched to direct-trunked transport, because they do not consider the internal IXC costs of such reconfigurations. These costs include administrative costs and the cost of additional ports on the IXC's switch to connect additional dedicated links. It is possible, though, to account for this at least in part. For

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238 Ex parte letter from Jo Ann Goddard Riley, Director, Federal Regulatory Relations, Pacific Telesis to Donna R. Searcy, Secretary, FCC, filed September 2, 1992.

239 Pacific also used a least-cost modeling approach. However, as noted earlier, we are not considering the results of Pacific's modeling runs because of certain deficiencies in its approach.

240 Bell Atlantic Comments at Appendix B, page 9.

instance, NYNEX's model assumed reconfiguration only where the price difference was at least 15%.

On the other hand, a least-cost model may err on the side of projecting too little reconfiguration from tandem-switched to direct-trunked transport, because it does not consider the non-price reasons why an IXC may choose direct-trunked transport. For instance, an IXC might choose direct-trunked transport even if it is somewhat more expensive in order to avoid the longer call setup time that results from use of the tandem switch.

Network engineering models do not consider the impact of specific regulatory pricing. Rather, these models implicitly assume that both rates and network efficiency considerations will drive IXCs to the same decisions on whether to use tandem-switched or direct-trunked transport. Network engineering models, therefore, may not accurately predict IXC choices if the pricing relationships diverge from the cost relationships implicit in the model. The interim rate structure and pricing plan will likely encourage more use of tandem-switched transport than the network engineering models would identify. The network engineering models, therefore, may tend to overstate the impacts on IXCs, by assuming that they will use direct-trunked transport even where tandem-switched transport is relatively inexpensive.

Bell Atlantic's approach assumed that neither large nor small IXCs would have opportunities to benefit from reconfiguration. Bell Atlantic engineers estimated that medium IXCs would reduce their tandem-routed trunks by 50% to eliminate underutilized trunks, and then convert 10% of the remaining tandem-switched usage to direct-trunking.[241] Because of the subjective nature of Bell Atlantic's approach, it is not susceptible to full review and critique, and it is difficult to determine the reliability of Bell Atlantic's results.

IXCs have criticized the reconfigured network results, alleging that the LECs used inconsistent approaches, and that some factors affecting IXCs' reconfiguration decisions are not accounted for.[242] Some of these reconfiguration models can provide useful insights into the impacts of IXC reconfigurations, although the reconfiguration results are somewhat more speculative than the existing network results. In particular, the reconfiguration models employing the network engineering approach to modeling used by Ameritech and US West do not appear to generate reliable results when

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241 Bell Atlantic Comments at Appendix B, page 9.

242 Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992; Sprint Reply Comments at 22-23, CompTel Reply Comments at 10-13; Schneider Reply Comments at 6-9, Cable & Wireless Reply Comments at 5-8.

Cable & Wireless has criticized the reconfiguration models for ignoring the nonrecurring costs associated with reconfiguration. See Cable & Wireless Reply Comments at 6. In this order, however, we are requiring the LECs to waive such nonrecurring costs until May 1, 1994.

applied to the interim rate structure and pricing plan adopted in this order. Moreover, we cannot conclude that the reconfiguration method employed by Bell Atlantic is reliable, because of its apparently subjective nature. We do not, therefore, consider the reconfigured model results in evaluating the impact of a transport rate restructure on different groups of IXCs. The reconfigured models do, however, support the proposition that the existing network is inefficiently engineered.

G. Other criticisms

1. Loading factors

Several parties contend that the reconfiguration models are defective because they use inconsistent assumptions about the number of circuits needed to carry an IXC's traffic.[243] It is unlikely that all IXCs would load their circuits with the same number of minutes of traffic. Thus, a number of different assumptions could be reasonable. The LECs did, over time, take some steps to harmonize the loading factors employed in the models.[244] We find that none of the loading factors used was so unrealistic that the results must be rejected, although the different assumptions could affect the interpretation to be given to the results under some analyses. Comptel has criticized the use of 8600 minutes of use as the loading factor for dedicated trunks when the loading factor for the common transport link is 9000 minutes or higher. This assumption, however, could be reasonable if the tandem costs on the tandem-switched transport link are considered. Any distortion that might be created by the use of different loading factors, however, is rendered harmless since we do not consider the reconfigured network runs.

Several parties have also alleged that both the existing and reconfigured models are inadequate because the LECs used different loading factor assumptions in calculating common transport rates.[245] While this was true of the November runs, the Commission staff has subsequently specified the loading factors to be used in each run, and the LECs have filed matrixes showing that they used consistent loading factors.

2. Meet point billing

Several parties assert that the models do not consider the effect of

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243 Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992; Sprint Reply Comments, CompTel Reply, Ad Hoc Reply Comments at 5-7.

244 See, e.g., Ex parte letter from W.W. Jordan, Director - Federal Regulatory, BellSouth to Donna R. Searcy, Secretary, FCC, filed July 28, 1992.

245 Ex parte letter from Genevieve Morelli, Vice President and General Counsel, CompTel to Donna R. Searcy, Secretary, FCC, filed May 5, 1992; and CompTel Reply Comments at 11; Ad Hoc Reply Comments at 5-7.

meet point billing costs.[246] We conclude that this is not a material omission in evaluating the impact of the rate structure revisions on small IXCs. The LECs argue that the inclusion or exclusion of meet point usage does not significantly affect the modeling results.[247] In fact, the exclusion of the costs of the secondary carrier in a meet point situation would be more likely to overstate the impacts on small IXCs since those IXCs generally have a lesser presence in rural areas.

3. 800 database implementation

Several commenters argue that the models ignore the effects of 800 data base implementation.[248] LEC implementation of 800 data base will require that more traffic be routed to the tandems. There was, however, no reasonable way for the LECs to predict in their modeling the precise share of the 800 market that each IXC would obtain. All IXCs that offer 800 service will increase their tandem usage for some period of time.

4. Unavailability of IXC-specific impacts

Several parties allege that the models are defective because they do not produce individual IXC impact numbers that could have been made available to the individual IXCs.[249] The modeling effort was not intended to estimate the effect of the rate structure and pricing changes on any one IXC, but rather was designed to estimate the impact on a group of IXCs that generally possesses similar operating characteristics. We believe that the LEC existing network models have reasonably estimated the impacts by groups of IXCs. Any effort to develop a model that reflected the operating conditions and network design approach of all IXCs in a LEC's serving area would have been extremely burdensome and time-consuming. It is not clear that the results of such an effort would have been any more useful than the existing data in resolving the issues raised in this proceeding, given the additional cost that any such effort would have entailed.

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246 Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992; Schneider Reply Comments at 7; MCI Reply Comments at 32.

247 Ex parte letter from W.W. Jordan, Director - Federal Regulatory, BellSouth to Donna R. Searcy, Secretary, FCC, filed March 23, 1992.

248 Ex parte letter from Leon M. Kestenbaum, Vice President, General Regulatory Counsel/Federal, US Sprint to Donna R. Searcy, Secretary, FCC, filed July 14, 1992; MCI Reply Comments at 31; Ad Hoc Reply Comments at 6.

249 Ex parte letter from Brian K. Sulmonetti, Director-Regulatory Affairs, ATC Long Distance to Donna R. Searcy, Secretary, FCC, filed June 17, 1992; CompTel Reply Comments at 10; Metromedia Reply Comments at 5.

5. Peakedness assumptions

Several IXCs assert that the network engineering models assume too little peakedness on the tandem to SWC routes.[250] This issue relates only to the reconfiguration models, and since we do not rely on the data from the reconfiguration models, this issue is not material. As with other network design issues, however, there is no single right answer to the amount of peakedness that should be incorporated in a model.[251] The IXC must make a trade-off between higher costs for more circuits and a somewhat higher blockage rate.

6. Originating and terminating traffic on the same trunks

Cable & Wireless argues that it is standard IXC practice to use separate trunks for originating and terminating traffic, and that the LEC models did not reflect this factor.[252] We conclude that it was reasonable for the LECs to employ a bidirectional trunking assumption in designing their models. Bidirectional traffic is technically possible in many cases since LEC tariffs today offer services that combine originating and terminating traffic on the same trunking facility. This permits the LEC to minimize the transmission capacity deployed in the access network, which results in efficiency gains in the access network. If an IXC desires separate trunks, it is free to make that business decision. The cost of that decision, however, should not be attributed to the rate structure change, and the impact models reasonably did not assume the use of separate trunks.

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250 See MCI Reply Comments at 36; Schneider Reply Comments at 7; ex parte letter from Don Detampel, President, Schneider Communications to Donna R. Searcy, Secretary, FCC, filed May 22, 1992; Cable & Wireless Reply Comments at 6.

251 We note that Ameritech changed its peakedness factor in response to Schneider's concern that it was too low.

252 See Cable & Wireless Reply at 6.

APPENDIX D: RULE CHANGES

AMENDMENTS TO CODE OF FEDERAL REGULATIONS

PART 61 - TARIFFS

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: Secs. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203, unless otherwise noted.

2. Section 61.42 is amended by revising paragraphs (e)(1)(iii) and by adding paragraphs (e)(1)(iv) and (e)(1)(v) to read as follows:

61.42 Price cap baskets and service categories.

* * * * *

(e) * * *

(1) * * *

(iii) Entrance facilities, direct-trunked transport, and dedicated signalling transport, as described in §§ 69.110, 69.112, and 69.125, respectively of this chapter.

(iv) Tandem-switched transport, as described in § 69.111 of this chapter.

(v) Interconnection charge, as described in § 69.124 of this chapter.

3. In section 61.47, paragraph (e) is redesignated as (e)(1), and paragraphs (e)(2) and (e)(3) are added to read as follows:

61.47 Adjustments to the SBI; pricing bands.

* * * * *

(e)(2) Notwithstanding paragraph (e)(1) of this section, the upper pricing band for the tandem-switched transport service category shall limit the annual upward pricing flexibility for this service category, as reflected in its SBI, to two percent, relative to the percentage change in the PCI for the traffic sensitive switched interstate access basket, measured from the last day of the preceding tariff year. The lower pricing band for the tandem-switched transport service category shall limit the annual downward

pricing flexibility for this service category, as reflected in its SBI, to five percent, relative to the percentage change in the PCI for the traffic sensitive switched interstate access basket, measured from the last day of the preceding tariff year.

(e)(3) Notwithstanding paragraph (e)(1) of this section, the upper pricing band for the interconnection charge service category shall limit the annual upward pricing flexibility for this service category, as reflected in its SBI, to zero percent, relative to the percentage change in the PCI for the traffic sensitive switched interstate access basket, measured from the last day of the preceding tariff year. There shall be no lower pricing band for the interconnection charge.

4. Section 61.48 is amended by adding paragraphs (g) and (h) to read as follows:

61.48 Transition rules for price cap formula calculations

* * * * *

(g) Local exchange carriers subject to price cap regulation shall set initial rates for entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport, to be filed with an effective date of November 1, 1993, according to the requirements set forth in §§ 69.110, 69.111, 69.112, and 69.125, respectively.

(h) Local exchange carriers subject to price cap regulation shall set the initial upper limit for the interconnection charge, to be filed with an effective date of November 1, 1993, according to the requirements set forth in § 69.124.

PART 65 - INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

Part 65 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat., 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.702 is amended by revising paragraph (b) to read as follows:

65.702 Measurement of interstate service earnings.

* * * * *

(b) * * * The access service categories shall be: an aggregated category consisting of Special Access, § 69.113, Connection Charges for Expanded Interconnection, § 69.121, and Contribution Charges for Special Access and Expanded Interconnection, § 69.122; Common Line, §§ 69.104-69.105; and an aggregated category consisting of Line Termination, § 69.106, Intercept, § 69.108, Local Switching, § 69.107, Transport, §§ 69.110-69.112, 69.124, 69.125, and Information, § 69.109. The Billing and Collection access element shall not be included in any access service category for purposes of this part. The Commission will also separately review exchange carrier overall interstate earnings subject to this part for determining compliance with the maximum allowable rate of return determined by § 65.700 (b).

* * * * *

PART 69 - ACCESS CHARGES

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended 47 U.S.C. 154, 202, 203, 205, 218, 403, unless otherwise noted.

2. Section 69.1 is amended by revising paragraph (c) to read as follows:

69.1 Application of access charges.

* * * * *

(c) The following provisions of this part shall apply to telephone companies subject to price cap regulation only to the extent that application of such provisions is necessary to develop the nationwide average carrier common line charge and for purposes of reporting pursuant to §§ 43.21 and 43.22: §§ 69.3(f), 69.105(b)(4), 69.105(b)(5), 69.106(b), 69.107(b), 69.107(c), 69.109(b), 69.114(b), 69.114(d), 69.205(e), 609.301 through 69.310, and 69.401 through 69.412. The computation of rates pursuant to these provisions by telephone companies subject to price cap regulation, as that term is defined in § 61.3(v) of this chapter, shall be governed by the price cap rules set forth in part 61 of this chapter and other applicable Commission Rules and orders.

3. In Section 69.2, paragraphs (nn) through (ss) are added to read as follows:

69.2 Definitions.

* * * * *

(nn) Dedicated Signalling Transport means transport of out-of-band signalling information between an interexchange carrier or other person's common channel signalling network and a telephone company's signalling transport point on facilities dedicated to the use of a single customer.

(oo) Direct-Trunked Transport means transport from the serving wire center to the end office on circuits dedicated to the use of a single interexchange carrier or other person, without switching at the tandem.

(pp) End Office means the telephone company office from which the end user receives exchange service.

(qq) Entrance Facilities means transport from the interexchange carrier or other person's point of demarcation to the serving wire center.

(rr) Serving Wire Center means the telephone company central office designated by the telephone company to serve the geographic area in which the interexchange carrier or other person's point of demarcation is located.

(ss) Tandem-Switched Transport means transport from the serving wire center to the end office that is switched at a tandem switch. Tandem-switched transport consists of circuits dedicated to the use of a single interexchange carrier or other person from the serving wire center to the tandem (although this dedicated link will not exist if the serving wire center and the tandem are located in the same place) and circuits used in common by multiple interexchange carriers or other persons from the tandem to the end office.

4. Section 69.4 is amended by revising paragraph (b) to read as follows:

69.4 Charges to be filed.

* * * * *

(b) Except as provided in subpart C of this part, in §§ 69.4 (c), (d), (e), and (f), and in § 69.118, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements:

* * *

(5) Tandem-switched transport;

(6) Direct-trunked transport;

(7) Special access; and

(8) Entrance facilities

5. Section 69.108 is added to read as follows:

69.108 Transport rate benchmark.

(a) For transport charges computed in accordance with this subpart, the DS3-to-DS1 benchmark ratio shall be calculated as follows: the local telephone company shall calculate the ratio of (1) the total charge for a one mile channel termination, ten miles of interoffice transmission, and one DS3 multiplexer using the telephone company's DS3 special access rates to (2) the total charge for a one mile channel termination plus ten miles of interoffice transmission using the telephone company's DS1 special access rates.

(b) Transport rates will generally be presumed reasonable if they are based on special access rates with a DS3-to-DS1 benchmark ratio of 9.6 to 1 or higher.

(c) If a local telephone company's transport rates are based on special access rates with a DS3-to-DS1 benchmark ratio of less than 9.6 to 1, those transport rates will generally be suspended and investigated absent a substantial cause showing by the local telephone company. Alternatively, the local telphone company may adjust its transport rates so that the DS3-to-DS1 ratio calculated as described in (a) of those rates is 9.6 or higher. In that case, rates that depart from existing special access rates so as to be consistent with the benchmark will be presumed reasonable only so long as the ratio of projected revenue recovered through the interconnection charge to the projected revenue recovered through facilities-based charges is the same as it would be if the telephone company's existing special access rates were used.

6. Section 69.110 is added to read as follows:

69.110 Entrance Facilities.

(a) A flat-rated entrance facilities charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use telephone company facilities between the interexchange carrier or other person's point of demarcation and the serving wire center through October 31, 1995.

(b)(1) For carriers subject to price cap regulation as that term is defined in § 61.3(v), initial entrance facilities charges based on special access channel termination rates for equivalent voice grade, DS1, and DS3 services as of September 1, 1992, adjusted for changes in the price cap index calculated for the July 1, 1993 annual filing for carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, generally shall be presumed reasonable if the benchmark defined in section 69.108 is satisfied. Entrance facilities charges may be distance-sensitive.

Mileage shall be measured as airline mileage between the point of demarcation and the serving wire center.

(b)(2) For rate of return carriers, entrance facilities charges based on special access channel termination rates for equivalent voice grade, DS1, and DS3 services generally shall be presumed reasonable if the benchmark defined in section 69.108 is satisfied. Entrance facilities charges may be distance-sensitive. Mileage shall be measured as airline mileage between the point of demarcation and the serving wire center.

(c) If the telephone company employs distance-sensitive rates:

(1) a distance-sensitive component shall be assessed to recover the costs of the transmission facilities, including any intermediate transmission circuit equipment between the end points of the entrance facilities; and

(2) a nondistance-sensitive component shall be assessed to recover the costs of the circuit equipment at the ends of the transmission links.

(d) Telephone companies shall apply only their shortest term special access rates in setting entrance facilities charges. Telephone companies shall not offer entrance facilities based on volume discounts for multiple DS3s or any other service with higher volume than DS3 through October 31, 1995.

7. Section 69.111 is amended by revising the section heading and paragraphs (a), (b), and (c) and adding paragraphs (d) and (e) to read as follows.

69.111 Tandem-Switched Transport and Tandem Charge.

(a) Tandem-Switched transport shall consist of two rate elements, a transmission charge and a tandem switching charge.

(b) A tandem-switched transmission charge expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers and other persons that use telephone company tandem-switched transport facilities through October 31, 1995. Tandem-switched transport transmission charges generally shall be presumed reasonable if the local telephone company bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links, calculated using a loading factor of 9000 minutes per month per voice-grade circuit. Tandem-switched transport transmission charges that are not presumed reasonable generally shall be suspended and investigated absent a substantial cause showing by the local telephone company. Tandem-switched transport transmission charges may be distance-sensitive. Mileage shall be measured as airline mileage between the serving wire center and end office.

(c) If the telephone company employs distance-sensitive rates:

(1) a distance-sensitive component shall be assessed to recover the costs of the transmission facilities, including intermediate transmission circuit equipment between the end points of the interoffice circuit; and

(2) a nondistance-sensitive component shall be assessed to recover the costs of the circuit equipment at the ends of the interoffice transmission links.

(d) A tandem switching charge expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers and other persons that use telephone company tandem switching facilities.

(e) Through October 31, 1995, the tandem charge shall be set to recover twenty percent of the projected annual Part 69 interstate tandem revenue requirement for COE Category 2, tandem switching, as described in Part 36.124 of the Commission's rules.

(f) All telephone companies, except centralized equal access providers as described in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, ___ FCC Rcd ___ (1992), shall provide tandem-switched transport service.

8. Section 69.112 is amended by revising the section heading and paragraphs (a), (b), and (c) to read as follows and by removing paragraph (d).

69.112 Direct-Trunked Transport.

(a) A flat-rated direct-trunked transport charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use telephone company direct-trunked transport facilities through October 31, 1995.

(b)(1) For carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, initial direct-trunked transport charges based on the interoffice charges for equivalent voice grade, DS1, and DS3 special access services as of September 1, 1992, adjusted for changes in the price cap index calculated for the July 1, 1993 annual filing for carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, generally shall be presumed reasonable if the benchmark defined in section 69.108 is satisfied. Direct-trunked transport charges may be distance-sensitive. Mileage shall be measured as airline mileage between the serving wire center and end office.

(b)(2) For rate of return carriers, direct-trunked transport charges based on the interoffice charges for equivalent voice grade, DS1, and DS3 special access services generally shall be presumed reasonable if the benchmark defined in section 69.108 is satisfied. Direct-trunked transport

charges may be distance-sensitive. Mileage shall be measured as airline mileage between the serving wire center and end office.

(c) If the telephone company employs distance-sensitive rates:

(1) a distance-sensitive component shall be assessed to recover the costs of the transmission facilities, including intermediate transmission circuit equipment, between the end points of the circuit; and

(2) a nondistance-sensitive component shall be assessed to recover the costs of the circuit equipment at the ends of the transmission links.

(d) Telephone companies shall apply only their shortest term special access rates in setting direct-trunked transport rates. Telephone companies shall not offer direct-trunked transport rates based on volume discounts for multiple DS3s or any other service with higher volume than DS3 through October 31, 1995.

(e) Centralized equal access providers as described in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, ___ FCC Rcd ___ (1992), are not required to provide direct-trunked transport service. Telephone companies that do not have measurement and billing capabilities at their end offices are not required to provide direct-trunked transport service at those end offices without measurement and billing capabilities. All other telephone companies shall provide a direct-trunked transport service.

9. Section 69.113 is amended by revising paragraph (a) to read as follows:

69.113 Non-premium charges for MTS-WATS equivalent services.

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive access that is not deemed to be premium access as this term is defined in § 69.105(b)(1) in lieu of carrier charges that are computed in accordance with §§ 69.105, 69.106, 69.110, 69.111, 69.112, 69.118, 69.124, and 69.127.

* * * * *

10. Section 69.118 is amended as follows:

69.118 Traffic sensitive switched services.

Notwithstanding §§ 69.4(b), 69.106, 69.109, 69.110, 69.111, 69.112, and 69.124, telephone companies subject to the BOC ONA Order, 4 FCC Rcd 1 (1988), shall, and other telephone companies may, establish approved Basic Service Elements as provided in amendments of part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network

Architecture, CC Docket No. 89-79, FCC 91-186, 6 FCC Rcd 4524 (1991). Telephone companies shall take into account revenues from the relevant Basic Service Element or Elements in computing rates for the Local Switching, Entrance Facilities, Tandem-Switched Transport, Direct-Trunked Transport, Interconnection Charge, and/or Information elements.

11. Section 69.124 is added to read as follows:

69.124 Interconnection Charge.

(a) An interconnection charge expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers and upon all other persons interconnecting with the telephone company switched access network, except as provided in subsection (c).

(b)(1) For rate-of-return carriers, the interconnection charge shall be computed by subtracting projected entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport revenues from the Part 69 transport revenue requirement, and dividing by the projected total transport minutes.

(b)(2) For carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, the interconnection charge shall be set initially to comply with the price cap rate restructure requirement of revenue neutrality.

(c) Centralized equal access providers as described in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, ___ FCC Rcd ___ (1992), are not required to assess an interconnection charge.

12. Section 69.125 is added to read as follows:

69.125 Dedicated Signalling Transport.

(a) Dedicated signalling transport shall consist of two subelements, a signalling link charge and a signalling transfer point (STP) port termination charge.

(b) A flat-rated signalling link charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use facilities between an interexchange carrier or other person's common channel signalling network and a telephone company signalling transfer point or equivalent facilities offered by a carrier subject to price cap regulation as that term is defined in § 61.3(v) of this chapter. Signalling link charges may be distance-sensitive. Mileage shall be measured as airline mileage between the interexchange carrier's or other person's common channel signalling network and the telephone company's signalling transfer point.

(1) Signalling link rates shall be based on the interoffice charges for equivalent special access services. Carriers that have previously tariffed a signalling link service for signalling transport between the interexchange carrier's or other person's common channel signalling network and the carrier's STP are permitted to use the rates that are in place on September 1, 1992, adjusted for changes in the price cap index for the July 1, 1993 annual filing for carriers subject to price cap regulation as that term is defined in § 61.3 (v) of this chapter.

(c) A flat-rated STP port termination charge expressed in dollars and cents per port shall be assessed upon all interexchange carriers and other persons that use dedicated signalling transport.

13. Section 69.126 is added to read as follows:

69.126 Nonrecurring charges.

As of the effective date of the Report and Order in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, ___ FCC Rcd ___ (1992), telephone companies shall not assess any nonrecurring charges for service connection until May 1, 1994, when an interexchange carrier converts trunks from tandem-switched transport to direct-trunked transport or from direct-trunked transport to tandem-switched transport, or when an interexchange carrier orders the disconnection of overprovisioned trunks.

14. Section 69.127 is added to read as follows:

The transport rate structure in effect August 1, 1991, shall be retained until the tariffs filed pursuant to the Report and Order in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, ___ FCC Rcd ___ (1992) become effective.

15. Section 69.210 is removed.

16. Section 69.301 is amended by revising paragraph (a) to read as follows:

69.301 General

(a) For purposes of computing annual revenue requirements for access elements net investment as defined in § 69.2 (z) shall be apportioned among the interexchange category, the billing and collection category and access elements as provided in this subpart. For purposes of this subpart, local transport includes five elements: entrance facilities, direct-trunked transport, tandem-switched transport, dedicated signalling transport, and the interconnection charge. Expenses shall be apportioned as provided in Subpart E of this part.

* * * * *

17. Section 69.305 is amended by revising paragraph (b) to read as follows:

69.305 Carrier cable and wire facilities (C&WF).

* * * * *

(b) Carrier C&WF, other than WATS access lines, not assigned pursuant to paragraph (a) of this section that is used for interexchange services that use switching facilities for origination and termination that are also used for local exchange telephone service shall be apportioned to the Transport elements.

* * * * *

18. Section 69.306 is amended by revising paragraphs (a), (b), (c), and (e) to read as follows:

(a) The Separations Manual categories shall be used for purposes of apportioning investment in such equipment except that any Central office equipment attributable to local transport shall be assigned to the Transport elements.

(b) COE Category 1 (Operator Systems Equipment) shall be apportioned among the interexchange category and the access elements as follows: Category 1 that is used for intercept services shall be assigned to the Local Switching element. Category 1 that is used for directory assistance shall be assigned to the Information element. Category 1 other than service observation boards that is not assigned to the Information element and is not used for intercept services shall be assigned to the interexchange category. Service observation boards shall be apportioned among the interexchange category, and the Information and Transport access elements based on the remaining combined investment in COE Category 1, Category 2 and Category 3.

(c) COE Category 2 (Tandem Switching Equipment) that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in United States v. Western Electric Co. shall be assigned to the tandem switching charge subelement and the interconnection charge element. All other COE Category 2 shall be assigned to the interexchange category.

* * * * *

(e) COE Category 4 (Circuit Equipment) shall be apportioned among the interexchange category, and the Common Line, Limited Pay Telephone, Transport, and Special Access elements. COE Category 4 shall be apportioned in the same proportions as the associated Cable and Wire Facilities.

19. Section 69.307 is amended to read as follows:

General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Limited Pay Telephone, Local Switching, Information, Transport, and Special Access elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, excluding Category 1.3, combined.

Separate Statement of
Commissioner James H. Quello

RE: Local Transport Rate Structure and Pricing

I support the Report and Order and the Further Notice in this proceeding because the more promptly and definitively we move away from present uneconomic local transport rate structure to a revised permanent structure with equitable cost-reflective rates, the better we will have served the public interest. With regard to the Further Notice, as a veteran of the interexchange competition wars virtually from their inception, I can testify that there is a subtle yet immense difference between regulation that assures fair competitive market conditions and regulation that manages competition in a way that fair competitive market forces would not. In my view the Further Notice will pose serious questions that need to be answered to assure that local transport is structured and priced fairly. For that reason, I support the Further Notice and I will look forward to reviewing the data and comments we received in response to it.

September 17, 1992

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Report and Order on Expanded Interconnection with Local Telephone Companies (CC Docket No. 91-141);
Second Notice of Proposed Rulemaking on Expanded Interconnection with Local Telephone Companies (CC Docket No. 80-286); and
Report and Order on Transport Rate Structure and Pricing (CC Docket No. 91-213)

The three actions we take today -- implementation of expanded interconnection for special access, a proposal to implement expanded interconnection for switched access, and adoption of a new transport rate structure and prices -- cover some of the most important, complex and controversial issues this Commissioner has ever tackled. The questions presented are intricate, difficult to grasp and not susceptible to "quick fixes." Yet, from a consumer's perspective the basic result of the decisions is amazingly straightforward: rates for special access and switched transport services will decrease as competition increases.

I have been vigilant throughout these proceedings to ensure that in our efforts to stimulate the development of competition we have also given proper weight to the legitimate concerns of existing carriers and existing customers. An example of this balancing process is evident in the Special Access Expanded Interconnection Order. Upon concluding that the public interest is best served by a collocation policy, we simultaneously revised our rules to allow local exchange carriers to revise their special access prices so that they would not be hamstrung from competing with alternative access carriers. Similarly, in the transport proceeding, on the one hand we implement an interim rate structure that avoids immediate, excessive rate impacts on the smaller interexchange carriers, while on the other, we eliminate the equal charge per minute of use pricing structure, thus ensuring that the LECs can better meet the needs of the larger interexchange carriers.

The Further Notices we adopt today provide concrete evidence that our work has just begun. A final permanent transport rate structure and pricing plan have yet to be developed because we appreciate the need to move cautiously in this new competitive environment. In addition, the questions we ask about adopting expanded interconnection for switched transport are more complex

and controversial in their potential effect on local customers than those we addressed in the special access environment.

I am confident, however, that the record developed in both proceedings will provide significant guidance to the Commission as we further pursue our goals of increased competition, lower rates for consumers and continued high quality service. I can not emphasize enough the importance a well-developed record plays in proceedings of this magnitude and I urge all interested parties to devote whatever time and resources are necessary to assist us in our efforts.

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September 17, 1992

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: Transport Rate Structure and Pricing (CC Docket No. 91-213)

I believe that collectively the actions taken today represents a sensible response to the introduction of competition. This item takes affirmative steps in moving toward a more cost-based pricing system. These actions should be viewed as positive steps for the industry that will result in a greatly expanded market.

The adoption of an interim rate structure and pricing plan represents a cautious but important step toward a more cost-based rate system for transport. The use of a flat-rate entrance facilities charge should encourage IXC to make more efficient decisions about their use of the LEC network. This rate structure will also permit LECs to offer a flat-rate transport charge, thereby facilitating competition by allowing the LECs to offer services under a more cost-based rate structure. Under this rate structure the LECs will also be required to offer an end-to-end per-minute rate for tandem-switched transport. Moving forward with this interim rate structure allows us to move away from the inefficient equal charge rule while allowing all parties the opportunity to examine recently raised long-term rate structure issues in the FNPRM.

The item also finds that the use of special access rates modified by a benchmark approach represents a reasonable beginning point. This approach will serve as an added safeguard to identify any potential problems and allows us through the tariff process to more closely examine DS1/DS3 rate relationships. More importantly, however, this Order also seeks further comments on outstanding pricing issues. I certainly look forward to parties' comments and examination of these issues.

This Order does an exceptional job of trying to balance the three important goals outlined in this proceeding. The rate structure and rate levels established in this Order were crafted with an eye toward trying to balance these equally important, but sometimes conflicting goals: 1) efficient use of transport facilities by allowing pricing that reflects costs; 2) adopting a rate structure conducive to full and fair interexchange competition; and 3) avoiding interference with the development of interstate access competition. This Order carefully weighs both equity and efficiency principles.

The items on todays agenda represent a monumental event for the telecommunication industry. I must commend the Common Carrier Bureau on their comprehensive examination of these closely related issues. I would also like to acknowledge the important input of the staffs of all the Commissioners' offices.

September 17, 1992

Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking (CC Docket No. 91-213)

The debate over the proper rate structure and rate levels for local switched transport service is necessarily technical. It has also been hard fought, because it is important.

The future success of local competition, the ability of the local telephone companies to compete, the preservation of vigorous interexchange competition, even the protection of universal telephone service--- all these depend on our ability to reach a sound conclusion on the rate structure and rate level issues in this proceeding.

I support this item as a significant first step in the transition from the equal charge rule to a more rational, cost-based scheme. Our adoption of an interim rate structure and rate levels, while we consider difficult remaining questions before we settle on a final set of rules, is the right way to proceed. Our measured approach will preserve the vigorous competition we have fostered in the long distance market while moving in the direction of more cost-based transport prices. We also recognize the relationship between our decision today, in another proceeding, to require local telephone companies to provide expanded interconnection to competitors and the need to rationalize transport rates so that the LECs will be able to compete.

We are asking some demanding questions in the further notice we adopt today. We recognize, for example, that each of the rate structures we have considered so far has flaws, although the one we have prescribed for the interim--- the so-called "unitary" rate structure--- appears to me to have fewer. I am confident that our efforts, and those of the parties, will allow us to come up with a permanent rate structure that will be even more satisfactory.

We also will ask demanding questions with respect to using existing special access rates to determine transport rate levels. This is not merely an abstract inquiry; the answers we arrive at will affect the relative prices paid for transport by large, medium, and small interexchange carriers.

I also am intrigued by the "zone density" approach to pricing special access. It has the potential to solve a number of problems. It could yield more cost-based transport rates, and

relationships among special access rates may not be cost-based. Zone density pricing also could allow LECs to charge competitive prices without chilling the development of local competition. Finally, such pricing could preserve universal service by helping the LECs retain the business of their largest customers.

What are the larger goals, in my view, of this massive exercise? They are, first, to rationalize and make economically sound the prices paid for use of local exchange facilities by long distance telephone companies. This is, in a sense, the last remaining work of divestiture. The second goal is to manage the transition to a new access scheme without undoing what we have already achieved in the long distance marketplace. One of this agency's proudest achievements is that it has fostered the development of a vibrant, diverse interexchange marketplace. That achievement did not happen without a good deal of work by the Commission to make the experiment in long distance competition a success. We cannot take for granted that the long distance competition we are so proud of will survive--- or that local competition will grow and prosper--- without continued effort on our part. Although it is a tall order, I am confident that the FCC will accomplish these goals as it navigates its way through the transport and related proceedings.

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FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 28, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON TEXAS ALLTEL, INC. PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On October 1, 1992, Texas ALLTEL, Inc. (ALLTEL) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. ALLTEL requests an additional eleven months to complete the conversion of its Anahuac end office to equal access. According to ALLTEL, on October 5, 1990, MCI Telecommunications Corporation (MCI) requested that ALLTEL convert its end offices to equal access. Pursuant to Commission order, ALLTEL is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). The three year time period ends on October 5, 1993. ALLTEL seeks an additional eleven months, until September 30, 1994, to complete its equal access conversion.

ALLTEL states that its Anahuac office has a digital NEC-61K switch not equipped with equal access capability, and it will cost approximately $300,000 to achieve equal access. According to ALLTEL, it is in the process of modernizing its network, and will be replacing the switch in the Anahuac office. ALLTEL states, however, that the new switch will not be available from the manufacturer until the third quarter of 1994. ALLTEL argues that an additional eleven months will permit the equal access conversion to coincide with the completion of the upgrade program thereby increasing the number of customers who will benefit from the availability of equal access. ALLTEL states that MCI does not object to the revised conversion date.

Interested parties should file comments on the request by **November 12, 1992**, and reply comments by **November 27, 1992**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of the request can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

*U.S. Government Printing Office: 1992 — 342-145/80004